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No. 92-

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOSE MALDONADO ESPINOSA AND
CARMEN MALDONADO ESPINOSA,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals was erroneous in its decision upholding the District Court's failure to protect Petitioners' Fourth Amendment Rights through the application of the Exclusionary Rule.

2. Whether the Court of Appeals was erroneous in its decision upholding the District Court's failure to protect Petitioners' Fifth Amendment Rights through the application of the Exclusionary Rule.

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OPINIONS BELOW

The Opinion of the United States District Court for the District of Puerto Rico denying the defendant's motion to suppress is reported at 767 F.Supp. 1176 (1991), and is set forth in Appendix B to this Petition. The Opinion of the United States Court of Appeals for the First Circuit, also denying defendant's motion to suppress, is reported at 968 F.2d 101 (1st Cir. 1992), and is set forth in Appendix A to this Petition.

JURISDICTION OF THE COURT

Upon Petitioner's motion for extension of time, this Honorable Court granted Petitioner, until November 27, 1992, to file its petition for Writ of Certiorari.

Jurisdiction of this Court is conferred pursuant to 28 U.S.C.

§ 1254(1) establishing its review powers after the rendering of judgment or decree by a United States Court of Appeals, in this case, the United States Court of Appeals for the First Circuit (hereafter the "Court of Appeals"). In turn the Court of Appeals had previously reviewed the final decision of the United States District Court for the District of Puerto Rico (hereinafter the "District Court"), pursuant to 28 U.S.C. § 1291. The Opinion of the Court of Appeals was entered on June 30, 1992.

CONSTITUTIONAL PROVISIONS

AMENDMENT IV.

Searches and seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The District Court's initial jurisdiction was invoked under Article III of the United States Constitution; 28 U.S.C. § 1345; 21 U.S.C. § 841(a)(1) and § 955; and 18 U.S.C. § 2.

The Airport Scene

Petitioners, defendants in the District Court (hereafter "Petitioners"), were passengers on a domestic flight between Puerto Rico and Florida who, while waiting for their commercial flight, were "intervened" by agents of the United States Customs Service (hereafter "Customs"). The Customs agents (hereafter the "Agents" or the "Customs Agents"), followed what has been found by four (4) judges of the United States District Court for the District of Puerto Rico to be a recurring, conscious, intentional, and unconstitutional pattern of illegal activity. The Customs Agents used the X-ray machinery of the Department of Agriculture to examine petitioners' luggage after a "sniff dog" had given a positive indicia of narcotics. The use of the Department of Agriculture's machinery by Customs Agents has become standard operating procedure at Puerto Rico's Luis Munoz Marin International Airport (hereafter the "LMM Airport") for passengers and their luggage on both domestic and international flights.

In the instant case, the Customs Agents alleged that they were on a "training session" at the LMM Airport when their dog, instead of smelling and identifying the "dummy" luggage being utilized in their "test," alerted them to the presence of drugs in petitioners' luggage.

This pattern has been identified as Customs' *modus operandi* in Puerto Rico, as reflected in various judicial proceedings before the District Court here, and has been severely criticized, to wit: *United States* v. *Doe*, 786 F.Supp. 1073, 1075-1076 (D.P.R. 1991) (involving a training session at the American Airlines terminal during which passenger lug-

gage was identified by a dog and taken to Agriculture in accordance with certain Customs' "directives"); *United States* v. *De Los Santos Ferrer*, Cr. No. 91-149 (D.P.R. 1991) (hereafter *"Santos Ferrer"*) (where the Honorable Judge Raymond L. Acosta, United States District Judge ruled on another "training" session at the American Airlines terminal at the LMM Airport, an alert by a dog, and the taking of the baggage by Customs to the Department of Agriculture's X-ray machine);[1] and, *United States* v. *Mirtelina Jimenez*, Cr. No. 91-192 (D.P.R. 1991) (Honorable Chief Judge Gilberto Gierbolini).[2]

Petitioners' case arose from a "sniffing training session" being conducted by Customs Agent Raul Diaz at the American Airlines terminal at LMM Airport. The dog "casually" smelled petitioners' two pieces of luggage, located on a conveyor belt where other domestic luggage was kept after "check-in." Agent Diaz' supervisor, Juan Hurtado, instructed him to take the suitcases to the Department of Agriculture's X-ray machine. Upon viewing the X-ray, the presence of loaf-shaped packages was revealed. Relying on the information acquired through the illegal X-ray, Agent Diaz then returned to the conveyor belt and had the dog smell the rest of the luggage, not casually, but intentionally. The dog identified two more pieces of suspect luggage, which again were taken to the Department of Agriculture's X-ray machine, revealing more loaf-shaped packages.

Subsequently, the U.S. Customs agents identified petitioners as the persons who had checked-in the luggage and requested that they accompany the agents to the Customs area. At the U.S. Customs area, petitioners were placed in separate rooms and handcuffed to the chairs in which they were seated. They were not read their *Miranda* rights. They were interrogated by the Customs Agents. Petitioner Carmen

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[1] See attached copy of Order Suppressing Illegally obtained evidence at Appendix C.

[2] See attached copy of Order at Appendix D.

Maldonado, while handcuffed and at the request of the U.S. Customs agent, reached into her carry-on bag and gave Customs' supervisory special agent Garcia petitioners' airline tickets.

Upon realizing that the airline tickets did not contain the baggage claim stubs, Customs Agents then subjected petitioners and their immediate area to a "security search." It was not until after the Agents had found the baggage claim stubs in the side pocket of petitioner Carmen Maldonado's carry-on bag that petitioners were read their *Miranda* rights.

Using the information illegally obtained through the illegal use of the X-ray machine and the improper custodial interrogation, the Customs Agents forced petitioners to, in Mr. Jose Maldonado's case, "consent" to a search of the luggage, and in Ms. Carmen Maldonado's case, to "disclaim" ownership of the luggage. The agent in charge of obtaining the "consent" and/or "disclaimer" stated that, in his experience, the loaf-shaped packages revealed in the X-ray contained drugs, and that he would get a warrant and open the suitcases unless petitioners consented to their being opened.[3] Clearly, the interrogating Agent was lying because he also testified that he had never secured a search warrant under *any* circumstances, let alone under those here under consideration. The aforesaid "consent" and/or "disclaimer" allegedly authorizing Customs to open the petitioners' luggage was the basis for the District Court's decisions to disregard the Exclusionary Rule.

The Suppression Hearing

Petitioners' trial attorneys jointly filed a Motion to Suppress and a Memorandum of Law in support thereof, causing the District Court to hold a hearing on the matter (hereafter the "Suppression Hearing"). The Honorable Jose A. Fuste, Dis-

[3] *United States* v. *Maldonado Espinosa*, 968 F.2d 101, 103 (1st Cir. 1992).

trict Judge, found that the random sniffing was legal[4], that the X-ray search of the luggage was unconstitutional, that petitioners' "consent"/"disclaimer" had been voluntary, and that the unconstitutional X-ray search did not play a significant role in obtaining petitioners' consent to the opening of the luggage at the Customs area.

Judge Fuste recognized that drug enforcement activities at LMM Airport were increasing. Furthermore, he found the Customs Agents were "inadequately trained in legally acceptable investigative techniques"; that they were performing drug screening of domestic travelers "with little or no understanding as to the legal ramifications of their actions"; that they had no knowledge of "what type of searches could be conducted, when, on whom, or on what"; and that the Agents who have appeared before him "established that *none of them had ever obtained a search warrant of any kind.*" *United States* v. *Maldonado-Espinosa*, 767 F.Supp. 1176, 1193 (D.P.R. 1991) (emphasis supplied). Once again, this demonstrates that the interrogating Agents obtained the "consent"/"disclaimer" by means of threats and lies regarding the certainty of their obtaining a warrant.

The District Court expressly held the X-ray search to be illegal. The District Judge appreciated that the search and seizure by the Customs Agents was done in contravention of constitutional standards, but nevertheless (and perhaps due to the large amount of drugs seized) decided to justify it, just this once. In concluding his opinion, Judge Fuste stated: "We hope that situation will be corrected in short order, and *that this court will not again be forced to justify after the fact searches which could and should have been conducted in a manner which would have raised no questions of legality.*" *Id.* at 1194 (emphasis supplied).

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[4] Honorable Judge Fuste made no distinction between the "casual" training session sniffing of the first two pieces of luggage and the subsequent sniffing of the remaining luggage.

The Judge's admonition engenders the image of a parent, knowing that his or her child has done something wrong, simply scolds the child and tells him or her not to do it again. Fortunately, under our system of justice, a constitutional wrong cannot be corrected or expiated through *future* conduct. The District Court's shortsighted approach to the government's unconstitutional conduct only serves to vindicate the unconstitutional and blatantly illegal acts of the Customs Agents, as will be illustrated below.

The Appeal

The appearing petitioners did not proceed to trial at the District Court level but entered a conditional plea pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, thereby preserving the issues raised in their suppression motion and memorandum as well and presented at the Suppression Hearing. The Court of Appeals found the District Court's findings adequately supported, thereby improperly condoning the District Court's justification, after the fact, of the unlawfully executed X-ray search and the so-called consented or disclaimed hand search. However, the Court of Appeals did not decide whether under the facts of the case (X-rays used after the government already had "probable cause" sufficient to obtain a search warrant) the X-ray was a constitutional search. Rather, and differently from the District Court's Opinion and Order[5], the Court of Appeals decided not to reach the issue, thus leaving undisturbed the holding that the X-ray search was illegal. It merely accepted the District Court's finding that the X-ray played no significant role in the "consent" and "disclaimer" which somehow, and retroactively, made the subsequent opening of the luggage and hand search thereof legal.

[5] *United States* v. *Maldonado-Espinosa*, 767 F.Supp. 1176 (D.P.R. 1991).

Concerning the X-ray search, the Court of Appeals stated: "We do note that the X-ray in this case is rather *unusual* — it was taken *after* the government already had 'probable cause' sufficient to obtain a search warrant." *United States* v. *Maldonado-Espinosa*, 968 F.2d 101, 104 (1st Cir. 1992) (emphasis supplied). The Court of Appeals realized that the search was illegal, but decided to term it an "unusual" law enforcement practice. Calling a search "unusual" is nothing more than a euphemism for calling it "illegal."

REASONS WHY THE WRIT SHOULD ISSUE

The Court of Appeals' refusal to address the issue of whether the agents X-ray search was constitutional deprived petitioners of a constitutional defense (the protections of the Fourth Amendment's Exclusionary Rule), to which they have a right. By limiting its analysis solely to the consent and disclaimer issues based on the facts adopted by the trial court, the appellate court failed to reach petitioners' main defenses: 1) that the search and seizure of the luggage was illegal and the fruit of the unconstitutional act, which cannot be legally used for any purpose whatsoever but must be suppressed; and (2) that the "consent" was a direct product of the illegally obtained evidence acquired through duress and coercion using the results of the unconstitutional X-ray search and other illegal methods including, but not limited to, lying to defendants.

The Fourth Amendment's sanctions against unreasonably obtained evidence requires not only that the evidence not be admitted at trial, but that it not be used at all.[6] While this

[6] The use of the unconstitutionally obtained evidence was squarely addressed by this Court as follows:

> The essence of a provision for bidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and

Court has stated that the Exclusionary Rule is not an absolute bar to the use of evidence, it has clearly indicated those instances where the evidence obtained in violation of it may be utilized. Absent here are any of the recognized exceptions to the Exclusionary Rule. In its decisions on the matter, this Honorable Court has recognized the following exceptions to the Exclusionary Rule: (1) When law enforcement agents act in good faith relying on a facially valid search warrant, *U.S.* v. *Leon*, 468 U.S. 897, 913, 920 (1984), or on a statute allowing a warrantless search, *Illinois* v. *Krull*, 480 U.S. 340, 349-355 (1987); (2) When the connection between the illegal conduct and the acquisition of the challenged evidence is so attenuated that it dissipates the taint of the unlawful act. *Wong Sun* v. *United States*, 371 U.S. 471, 487-488, (1963); (3) When the evidence was obtained through a source independent of the illegality. *Silverthorne Lumber Co.* v. *U.S.*, 251 U.S. 385, 392 (1920); (4) When the evidence would have inevitably been found by independent lawful means. *Nix* v. *Williams*, 467 U.S. 431, 446-448 (1984).

In the instant case, all searches and seizures were conducted without a warrant, so a finding of a good faith exception based on the warrant should be impossible. Both the District Courts and the Court of Appeals held that this was definitely not a border search, as initially claimed by Customs. Moreover, even under the broadest interpretation of the good faith exception, the Agents demonstrated a total disregard for the law during their investigation.

There were no attenuating or dissipating circumstances breaking the connection between the illegal search and the evidence obtained therefrom and further used to coerce "con-

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inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed. *Wong Sun* v. *United States*, 371 U.S. 471, 485, 9 L.Ed.2d 441, 453-454 (1963) (emphasis ours); *Harrison* v. *United States*, 392 U.S. 219, 222, 20 L.Ed.2d 1047, 1051 (1967).

sent" and/or "disclaimer" and the obtaining of further evidence, including the opening of the petitioners' luggage.

There was no independent source from which the evidence seized could have been acquired. There was only a mere after-the-fact and retroactive justification by the District Court and the Court of Appeals.

The Court of Appeals attempted to apply this theory to the petitioners' airline tickets and the claim checks obtained prior to the government's reading to the petitioners of their Miranda rights. Yet, the lower courts failed to take retreat when it was obvious that had there not been an initial illegal search, defendants would not have been subjected to the subsequent unconstitutional violations.

In the case of *Stone* v. *Powell,* this Honorable Court stated that: "[T]he Fourth Amendment assures 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' " *Stone* v. *Powell,* 428 U.S. 465, 495, 49 L.E.2d 1067 (1976). In addition, this Court has opined that it ". . . was intended to protect the 'sanctity of a man's home and the privacies of life' [citing *Boyd* v. *U.S.*, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886)], from searches under unchecked general authority." It is further stated in *Stone* that "[t]he exclusionary rule was a judicially created means of effectuating the rights secured by the Fourth Amendment. Prior to the Court's decisions in *Weeks* v. *U.S.*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and *Gouled* v. *U.S.*, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921), there existed no barrier to the introduction in criminal trials of evidence obtained in violation of the Amendment."

This Honorable Court is confronted herein with unconstitutional actions by Customs Agents (aided and abetted by the Department of Agriculture), which actions have been of a generalized nature for some time in Puerto Rico. Two issues are presented by the actions of the government's Agents: (1) whether their violations of the constitutional safeguards

against unreasonable searches was cured by their actions subsequent to the constitutional violations, and (2) whether such actions were sufficient to expunge the primary taint. The taint is not only related to the admission of the evidence, but to the inadmissibility of other evidence obtained as fruit of the first illegality. The once feared transgression and abuse of *bona fide* X-rays for administrative purposes is no longer a possibility, but has become a reality."[7]

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[7] In *U.S.* v. *Doe*, 786 F.Supp. at 1081-1082, Judge Pieras summed up his concerns about Customs unlawful activity as follows:

> In this case, the Customs agents did not act in good faith. There are no qualifications to the illegality of the searches they conducted. They are simply trying to use the defendants' disclaimer as a back-door tactic to retroactively validate their actions.
>
> The Court is therefore tempted to view the suppression in this case as having nothing to do with the defendant or his actions and instead reaching a decision solely on the conduct of the government. The Court's underlying concerns are based on the following. In addition to deterring illicit police conduct, one of the major reasons for the exclusionary rule is the interest of judicial integrity. In *McNabb* v. *United States*, 318 U.S. 332, 345, 63 S.Ct. 608, 615, 87 L.Ed. 819 *reh'g denied*, 319 U.S. 784, 63 S.Ct. 1322, 87 L.Ed. 1727 (1943), the Supreme Court noted that evidence obtained through flagrant disregard for federal law "cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law." In *Elkins* v. *United States*, 364 U.S. 206, 223, 80 S.Ct. 1437, 1447, 4 L.Ed.2d 1669 (1960), the Court, quoting this language, added that the courts should be even more hesitant to admit evidence obtained "in the willful disobedience of a Constitution they are sworn to uphold."

In Judge Acosta's ORDER SUPPRESSING ILLEGALLY OBTAINED EVIDENCE, Cr. No. 91-149 (Honorable Judge Raymond L. Acosta, United States District Court for the District of Puerto Rico), August 3, 1992, he stated:

> The factual scenario described above bears such a similarity to that presented to Judge Jose Antonio Fuste in *United States* v. *Maldonado-Espinosa*, 767 F.Supp. 1176 (D.P.R. 1991) as to catch this Court's attention to an apparent pattern of conduct exhibited by the Government agents at the airport in their avid pursuit of a "consent" to open suitcases believed to contain narcotics. . . .

Id., at p. 5.

The use by the agents of the unlawfully obtained information to question possible defendants, and to obtain "consented" waivers, must not be permitted to pass unnoticed by this Court. Even as we confront, not only in Puerto Rico, but in many places in the mainland as well, troubling circumstances due to drug trafficking, this Honorable Court must not allow the agents of the government to become the wrongdoers, the violators of the Constitution they are sworn to uphold. This Court should limit the powers of the Government's agents to intervene with persons to ensure that such powers are exercised within constitutional guidelines. To do otherwise would be to grant the Government *carte blanche* which will undoubtedly be abused, in the interests of "justice."

I. The Court Of Appeals Incorrectly Upheld The District Court's Failure To Protect Petitioners' Fourth Amendment Rights Through The Application Of The Exclusionary Rule.

It is respectfully submitted that the Court of Appeals' failure to decide that the constitutionality of the X-ray search and in failing to reach the natural consequences of the Agents' constitutional violations condones and affirmatively encourages further violations of our most fundamental rights. The Court of Appeals, in its cursory review of the important issues raised before it, as well as in its final opinion, sanctioned the District Court's departure from the accepted and usual course of judicial proceedings. The Court of Appeals' failure to review the constitutional violations was similar to the Magistrate Judge's actions in *United States* v. *De Los Santos Ferrer*, Cr. No. 91-149 (D.P.R. 1991), in which the Honorable Raymond L. Acosta, District Judge, stated:

The Magistrate failed to discuss and apparently did not consider the X-ray of the baggage a search, mentioning only in passing that "[u]pon subjecting luggage to X-rays after a canine affirmative reaction to contraband, the agents are in possession of probable cause to detain. . . ." Because we find this matter pivotal to our decision today, we must reject the Magistrate's tenuous treatment of this issue.

There is no question that the X-ray of a suitcase constitutes a search within the meaning of the Fourth Amendment. *United States* v. *Davis*, 482 F.2d 893 (9th Cir. 1973); *United States* v. *Sullivan*, 544 F.Supp. 701 (D.C. Me. 1982), *aff'd*, 711 F.2d 1 (1st Cir. 1983); *United States* v. *Epperson*, 454 F.2d 769 (4th Cir.) *cert. denied*, 406 U.S. 947 (1972). On the other hand, few will argue against the reasonableness of the uses of the X-ray machines at airports to detect dangerous artifices. This type of activity has long been licensed under the rationale of an administrative search and for much needed security reasons. *See United States* v. *$124,570 U.S. Currency*, 873 F.2d 1240, 1244 (9th Cir. 1989) (warrantless search of baggage at airport limited to administrative/regulatory scheme of excluding weapons and explosives from plane); *see also, United States* v. *Davis*, 482 F.2d 893, 908 (9th Cir. 1973) (essential purpose of the scheme is to deter persons carrying weapons or explosives from boarding airplane). In addition, the Department of Agriculture's X-ray of luggage at the airport is a lawful administrative/regulatory search, concerned only with agricultural products and meeting reasonable administrative search standards. *See generally, Camara* v. *Municipal Court of San Francisco*, 387 U.S. 523 (1967). As such, airport X-ray searches enjoy their administrative exception to the warrant rule only insofar as they are con-

> ducted to further compel the administrative purposes of keeping weapons and other items from being introduced into the aircraft. *United States* v. *Maldonado-Espinosa*, 767 F.Supp. 1176, 1187 (D.P.R.) (citing *U.S. Currency*, 873 F.2d at 1244).
>
> Neither of these administrative-type X-ray searches was effectuated upon defendant'[s] suitcases. The Custom officials in this case indicated they they took the luggage to the Agriculture Department's X-ray machine after their trained canine had given them a positive response, without seeking a warrant and even before defendant was detained. Because this search cannot qualify as a valid search pursuant to a regulatory scheme meeting administrative standards, and because it was not performed as a routine inspection under normal Agriculture operations the Customs agents acted unconstitutionally when they took X-rays of the suitcases, rather than securing a search warrant to open defendant's luggage. *Cf. United States* v. *Maldonado-Espinosa*, No. 91-1243, slip op. at 7 (1st Cir. June 30, 1992) [968 F.2d 101, 104 (1st Cir. 1992)] (noting that the X-ray in that case was "rather unusual" but declining to decide the issue of whether an X-ray search of luggage after the government already has probable cause is unconstitutional).
>
> *Armed with the knowledge that the suitcases contained "packages" of narcotics, the agent utilized this unlawful intrusion for yet another purpose, i.e. to pressure defendant into giving her consent to open the luggage.*

See Id., ORDER SUPPRESSING ILLEGALLY OBTAINED EVIDENCE, August 3, 1992, at pp. 8-10 (emphasis supplied).

It is respectfully submitted that the District Court erred when it found that the illegal X-ray had nothing to do with petitioners' "consent" and/or "disclaimer," and that the Court

of Appeals erred by not reaching the merits of the argument presented.[8] It was this critical piece of illegally obtained information, coercively used, without counsel being present, that led to the so-called "consent." Following this Court's guidelines in *Harrison* v. *United States*, 392 U.S. 219, 20 L.Ed.2d 1047 (1967), the facts show that the government "released the spring" and did not demonstrate that petitioners' "consent" and/or "disclaimer" were obtained by means sufficiently distinguishable from the underlying illegality to be purged of the primary taint. The fruits of the evidence seized from petitioners in violation of their Fourth Amendment rights were directly used by the agents in order to coerce petitioners to "consent." Such fruits should have been excluded. *See Alderman* v. *United States*, 394 U.S. 165, 171, 22 L.Ed.2d 176, 185 (1969); *United States* v. *Calandra*, 414 U.S. 338, 347, 38 L.Ed.2d 561, 571 (1974).

Other judges of the United States District Court for the District of Puerto Rico, who have presided over the four (4) cases cited herein, with strikingly similar facts, have determined that a subsequent X-ray search performed by Customs Agents on domestic luggage was an unconstitutional search converting any information obtained through this method into fruit of the poisonous tree. *See also Wong Sun* v. *United States*, 371 U.S. 471, 83 S.Ct. 407 (1963). This tainted information was used, in bad faith, by the Customs Agents as

[8] Another form of prior illegality which may invalidate a consent is a search. Unquestionably, if evidence is uncovered in an illegal search and the defendant is "face to face with the incriminating evidence and able to see that the police had firm control over her home," [in our case luggage — a personal effect] a consent to police seizure of the evidence is not voluntary. The same is true if the police in the course of an illegal search find certain incriminating evidence and then obtain the permission of the person in charge of the place searched to search the balance of that place. The purported consent given in such circumstances is nothing more than "submission or resignation to police authority," for the individual most likely "erroneously believed that it was useless to resist." 3 LaFave, SEARCH AND SEIZURE, Validity of Consent, § 8.2(d), 2nd Ed. (1987)

leverage in obtaining the so-called "voluntary" "consent" and "disclaimer" of the defendants, in clear violation of their constitutional rights guaranteed by the Fourth Amendment.

In effect, there are two violations concerning consent in the case at bar. The first is the fact that the X-ray search performed by customs agents constitutes, *per se*, an illegal search and subsequently illegal seizure of the contents of the luggage in question herein. In this case, after the dog alert, Customs agents already had reason and time to spare to secure a search warrant for the luggage in question yet, they chose to X-ray the luggage without a warrant. Then, flagrantly continued to violate the defendants' Fourth and Fifth Amendment rights by using the results of the X-ray to coerce consent or "disclaimer" from either of the defendants to open the luggage and seize the contents within.

In the landmark case *Florida* v. *Royer*, 460 U.S. 491 (1983), 103 S.Ct. 1319, this Honorable Court reaffirmed its holding in *Bumper* v. *North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968), that when the "validity of [a] search rests on consent, [the] state has [the] burden of proving that consent was obtained *and that it was freely and voluntarily given*, a burden that is not satisfied by showing mere submission to [the] claim of lawful authority." (emphasis ours). In *United States* v. *Davis*, 482 F.2d 893 (9th Cir. 1973), the United States Court of Appeals for the Ninth Circuit reiterated that "[t]he government bears the initial burden of proving consent." It is respectfully submitted that the government has failed to meet its burden in establishing the petitioners' consent. To the contrary, the opposite was found; the consent was illegally obtained. *Royer* controls the instant situation.

Another standard for assessing the validity of a purported consent to a search utilizes the "voluntariness" test and all circumstances related to the consent. *See Schneckloth* v. *Bustamonte*, 412 U.S. 218, 36 L.Ed.2d 854 (1973). The so-

called voluntary "consent" allegedly given by petitioner Jose Maldonado is permeated with illegality; hence, the use of illegally obtained information as leverage to purport a vitiated consent. Jose Maldonado had no choice but to "consent." This type of consent is not voluntary and certainly falls woefully short of the *Royer* requirement that the consent be "freely and voluntarily given." The "consent" obtained by the Customs Agents from Jose Maldonado was clearly coerced and constitutes an egregious violation of his Fourth Amendment rights.

An examination of the transcripts of the Suppression Hearing will reveal that what Jose Maldonado did in fact do was not consent, but rather *succumb* to the pressure applied by the Customs Agents interrogating him; it is reflected in the transcripts that Jose Maldonado repeatedly refused to consent to the opening of the luggage; rather, he *succumbed* to the coercion to which the Customs Agents had subjected him.

The Agents claimed that Jose Maldonado "gestured positively" and that they took this to mean he had consented. Oddly enough, the Agents did not explain why, if the obtained consent was voluntary, they were forced to *pry open the petitioners' suitcases with a knife.* Had they validly obtained voluntary consent they simply could have opened them with the key.

Defendant Carmen Maldonado's "disclaimer" falls within the scope of *United States* v. *Ocheltree*, 622 F.2d 992, 994 (9th Cir. 1980) cited by Judge Acosta in his *Santos Ferrer* order granting defendants motion to suppress. In *Ocheltree* it was held that consent is not voluntary when it is given under the threat of securing a warrant. Judge Acosta held:

The DEA and Customs agents who questioned defendant in the Customs enclosure area insisted on pressuring her with the results of the illegal x-ray search reiterating the fact that a warrant would nevertheless be obtained to open the valises. Faced with the futility of her refusal, defendant denied ownership, telling the agents to do whatever they wanted

with the bags. This situation created a sense of resignation in her mind that rendered her alleged disclaimer involuntary and a fruit of the prior illegality. *See Wong Sun* v. *United States*, 371 U.S. 471, 83 S.Ct. 407 (1963).

With respect to alleged "consent" given by petitioner Carmen Maldonado, the transcripts of the Suppression Hearing demonstrate that she was "incoherent"; "crying"; "nervous"; and "not in a good emotional state," as testified to by Customs Agent Nieves. It is abundantly clear that Carmen Maldonado was not in any state to offer a voluntary, let alone valid, consent to the Agents. This is the testimony of the same Agent who claimed that Carmen Maldonado "voluntarily" consented to the search which he conducted. This is also the same agent whose role in the above cited case of *Santos Ferrer* bears such a striking similarity to the petitioners' situation that it compels the conclusion that he displayed a reckless and wanton disrespect for the constitutional rights of others, as was eloquently expressed by Judge Fuste in his opinion and Order of June 14, 1991 in *United States* v. *Maldonado-Espinosa*, 767 F.Supp. 1176, 1193 (D. Puerto Rico 1991). *See also Channel* v. *United States*, 285 F.2d 217, 220 (9th Cir. 1960) (The psychological atmosphere in which the consent is obtained is a critical factor in the determination of voluntariness.); *Judd* v. *United States*, 190 F.2d 649, 651, 89 U.S.App.D.C. 64, (1951); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (In looking at the factual issue of voluntariness, the Court must be aware of the "vulnerable subjective state" of the defendant as well as the possibility of "subtly coercive police questions"); *United States* v. *Rothman*, 492 F.2d 1260 (9th Cir. 1973) ("... we are compelled to hold that the consent was not voluntary because it was systematically psychologically coerced").

In this respect, the Court of Appeals erred by not considering the totality of the circumstances, and by limiting its reasoning to an *a priori* assumption that the consent was valid. The District Court's and the Court of Appeals' decisions

vindicate Professor Weinreb's premonition that the courts' opinions would be composed of "a lengthy factual description followed by a conclusion (most likely, in the current climate, that consent was voluntarily given), without anything to connect the two."[9] In the instant case not only are we presented the lengthy factual situation and the District Court's deference to the Agents' testimony; the analysis of the totality of the circumstances is wholly lacking. By not entering into the X-ray issue the District Court failed to properly evaluate the Agent's failure to utilize the unconstitutionally obtained evidence to convey the idea that petitioners were helpless; the warrant was to be obtained. The Agents made it clear that they had seen the loaf-shaped packages used to carry drugs in petitioners' suitcases. The Agents represented not a possibility, but a certain result of their obtaining a warrant. This has been found to be coercion.[10] The particular facts of this case make

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[9] 3 LaFave, SEARCH AND SEIZURE, Validity of Consent, § 8.2, 2nd Ed. (1987) (Quoting from Weinreb, *Generalities of the Fourth Amendment*, 42 U.Chi.L.Rev. 47, 57 (1974)).

[10] Initially, it would seem that a threat to *seek* (rather than to *obtain)* a search warrant is least like the situation in *Bumper*, for it is in no sense a false or overstated claim of authority and, indeed, might be said fairly to state the legal position of the person from whom the consent is sought. Consents given in response to a threat to seek a warrant have been upheld as voluntary (provided, of course, that in making the threat the police were not "trading on" a prior Fourth Amendment violation). Sometimes it is indicated that the result would be otherwise if the officer had said he would obtain a warrant, although in a great many cases no distinction is drawn between a threat to seek versus a threat to obtain a warrant. The argument that the distinction is an extremely important one is well stated by the concurring judge in *United States* v. *Faruolo:*

> First, the agent should be permitted to do no more than give his prediction. Even if he need not explain the discretionary aspect of issuing warrants, he surely should not be permitted to convey the idea that no discretion exists. Any intimation that the warrant will automatically be issued should be considered as coercive as the announcement of an invalid warrant in *Bumper*...

3 LaFave, SEARCH AND SEIZURE, Validity of Consent, § 8.2(c), 2nd Ed. (As amended in 1992) (Quoting from *United States* v. *Faruolo*, 506 F.2d 490 (2d Cir. 1974)).

it clear that the coercive act was based on evidence previously obtained by way of a violation to petitioners' constitutional rights. In this regard, the violation of petitioners' Fourth Amendment Rights was utilized by the Agents to convey to the terrified petitioners the erroneous belief that they could not protect their privacy by refusing to give consent.[11] The Agents' peering into the petitioners' luggage had already revealed the information needed by the Agents.

The totality of the circumstances demonstrates the following: (1) The Customs Agents have embarked on an activities which violate the Fourth Amendment; (2) In violating the Fourth Amendment, Customs and the Department of Agriculture have aided and abetted each other; (3) Several instances of such constitutional violations have come to the attention of various judges of the District Court of Puerto Rico; (4) The Court of Appeals, in refusing to reach the X-ray issue, its unconstitutionality, the agents disregard for the Fourth Amendment, the "trading on" their unconstitutional act, and the violation's coercive effect on the obtained "consent," committed a grave error of law, in violation of this Honorable Court's guidelines as per *Schneckloth*, by not taking the violation and its illegal use into consideration.[12]

With respect to what is permissible and what is not, it is not until this Supreme Court has clearly defined the boundaries which limit the government's actions that its officers and agents have the *duty* to comply. The present drug problem facing our country is a distressful situation for law enforcement officers, who, without proper guidance from this Court,

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[11] *Id.*

[12] As stated by petitioners in their appeal to the First Circuit: "The act of confronting the defendants with highly incriminating evidence obtained in an illegal manner is too significant to obviate on a mere subjective finding by the court below that the defendants would have consented/disclaimed anyway." Brief for Appellants, *United States* v. *Maldonado-Espinosa*, 968 F.2d 101 (1st Cir. 1992), (No. 91-2143), at pp. 24-25, referring to Judge Fuste's Opinion, *United States* v. *Maldonado-Espinosa*, 767 F.Supp. at p. 1191.

resort to having the ends justifying the means. The law enforcement arm of the government constantly seeks to expand its authority beyond what is permissible. We call to this Court's attention the Department of Justice's Memo dated April 2, 1992, which stated that "the X-ray search did not violate the Fourth Amendmemt, because air travelers know that their luggage is subject to X-ray inspection and even physical opening, and as a result they have a reduced expectation of privacy in the contents of the luggage they carry aboard an airplane." U.S. Department of Justice, April 2, 1992, Petitioners' Addendum # 3. This Supplemental Brief to Oral Arguments purports not only to eliminate any distinction between administrative/regulatory examinations and drug searches, but to make it reasonable for unlimited intrusions in the luggage of travelers; thus, the Fourth Amendment's protection of personal "effects" would no longer apply to travelers, irrespective of whether they are domestic or international travellers. Fortunately, the executive branch of our government does not make law. That is reserved to Congress, with this Honorable Court as the final arbiter as to the scope of any given law and as to the meaning and intention of the Constitution of the United States.

It is clear that the pattern of behavior exhibited by the Customs Agents at the LMM Airport in this and numerous other cases constitutes a clear violation of the integrity of the United States Constitution, the rights guaranteed by the Constitution to the people of the United States, and an outright violation of the moral precedents set forth by our Founding Fathers. In the cited cases from the United States District Court for the District of Puerto Rico, in which these issues gave rise to the controversy herein stated, several of the Agents reappear in the same roles; their pattern of conduct is so remarkably similar that they appear to have rehearsed it. In fact, in *U.S.* v. ***Mirtelina Jimenez,*** Cr. No. 91-192 (D.P.R. 1991) (Chief Judge Gilberto Gierbolini presiding), the same dog (Herschel) as in this case was used to justify the subse-

quent illegal search. It seems these Customs Agents believe that because they have been invested with the trust and the authority of the United States Government, they are above the law and need not uphold the Constitution.

The police state has been the cause of much writing for centuries. The unlimited abuse of the police power in not so remote times gave birth to the Fourth Amendment. The Exclusionary Rule, a judicially created remedy to deter future unlawful police conduct, is the tool through which this Honorable Court has achieved a balance in our society. *See Elkins* v. *United States*, 364 U.S. 206, 217, 4 L.Ed.2d 1669 (1960); *United States* v. *Calandra*, 414 U.S. 338, 347-348, 38 L.Ed.2d 561, 571 (1974); *Stone* v. *Powell*, 428 U.S. 465, 485, 49 L.Ed.2d 1067 (1976). Presently, with the fall of the communist regime in the Soviet Union, we no longer have a police state to despise, a foreign enemy. We will become our own enemy if we allow this country to be governed by anything other than the Rule of Law. It is the duty of this Honorable Court to decide what limitations our Constitution has placed on those in the executive branch of government in order to maintain the Rule of Law in this great country. It is through this Court's opinions and guidelines that America will rule itself. While difficult, this Court's decisions on these issues guarantees our freedoms. Short-term decisions will destroy our liberty.

Such are the simple reasons why it is respectfully submitted that this Honorable Court should grant *certiorari* and take cognizance of this case and allow petitioners to present the foregoing matters more fully.

II. The Court Of Appeals Incorrectly Upheld The District Court's Failure To Protect Petitioners' Fifth Amendment Rights Through The Application Of The Exclusionary Rule.

The Evidence Obtained Prior To The Reading Of The Miranda Warnings Must Be Suppressed For Violating The Defendants' Fifth Amendment Rights.

The Court of Appeals found that the petitioners had not raised this issue at the District Court level and were thus precluded from arguing it on appeal. Secondly, the Circuit Court held that the evidence against the petitioners would inevitably have been found pursuant to a search incident to arrest.

1. *The Appellants Did In Effect Raise The Issue Of The Violation Of Their Fifth Amendment Rights.*

The Court of Appeals in the instant case states at page 104 of its decision that "[t]he problem with the Maldonado's argument, however, is that they made no such argument in the district court"[13] concerning the violation of the petitioners' *Miranda* rights. The Court of Appeals' determination in this respect was erroneous, as this issue was placed before the District Court by defendants' trial attorney Juan R. Acevedo, Esq.'s, in the Memorandum of Law in Support of Defendants' Motion to Suppress. The arguments set forth in the Memorandum at page 7, paragraph 4, are incorporated herein by this reference, and read as follows:

> The Fourth Amendment applies to all seizures of a person, whether or not the seizure can be termed and

[13] *United States* v. *Maldonado-Espinosa*, 968 F.2d 101, 104 (1st Cir. 1992).

> [sic] arrest or an investigatory detention. *Cupp* v. *Murphy*, 412 U.S. 291, 291 (1973); *Davis* v. *Mississippi*, 394 U.S. 721 (1969). Any statement and/or evidence obtained as a result of the illegal search must be suppressed. *Hayes* v. *Florida*, 470 U.S. 811 (1985); *Dunaway* v. *New York*, 442 U.S. 200 (1979); *Florida* v. *Royer*, 460 U.S. 491 (1983).

Petitioners respectfully differ with the Court of Appeals in the area mentioned above that petitioners waived their Fifth Amendment rights by not raising the issue before the District Court. In Defendants' Motion to Suppress Arrest and Evidence dated April 30, 1991 it clearly states that the defendants:

> . . . move this court, pursuant to Rules 12(b)(3) and 41 of the Federal Rules of Criminal Procedure and the Fourth *and Fifth* Amendments to the Constitution of the United States to suppress their arrest on February 28, 1991 at the Luis Munoz Marin Airport in Carolina, Puerto Rico by United States Customs Service agents and to suppress any and all evidence seized as the result of the warrantless, illegal, and unreasonable search of a brown carry-on handbag and four suitcases. The defendants further move to suppress any other evidence to which any law enforcement agents may have been led by any evidence on information gathered or learned in the execution of such illegal arrest and the warrantless and unreasonable searches and seizures (emphasis supplied).

Moreover, it is stated that the defendants move to "suppress any other evidence to which any law enforcement agents may have been led by any evidence on information gathered or learned in the execution of such illegal arrest and the warrantless and unreasonable searches and seizures." Both the Fourth

and Fifth Amendments were invoked through these statements in an intentional attempt *not* to waive these rights. These points were not argued in depth and detail at the time the Motion was submitted due to the fact that prior to the Suppression Hearing there was as yet insufficient information as to the facts to argue the issues properly. That did not constitute a waiver of defendants' Fifth Amendment rights, inasmuch as their intention to invoke their Constitutionally guaranteed rights was clearly stated in the Motion to Suppress.

The Court of Appeals erred in not considering petitioners' argument as embodied in their subsequent Memorandum of Law in Support of Defendant's Motion to Suppress. At page 7 of the Memorandum, defendants, conscious of their limitations in defending the Fifth Amendment issue at the time, made a well-founded decision to *not* waive their Constitutional rights and simply "leave the door open" in that respect. For this reason page 7 of the Memorandum reads as follows: "It is well settled law that any evidence obtained or derived from a prior Fourth Amendment *or other unconstitutional or illegal act* is 'tainted' by the prior unconstitutional act and must be suppressed" (emphasis supplied).

After the Suppression Hearing, petitioners were not given the opportunity to further brief the facts and issues relevant to their assertion of their Fifth Amendment rights. In the interest that justice be served, it should be observed that in defendants' Brief before the Court of Appeals, at page 17, footnote 3, it is asserted "that the district court refused defendants' offer to brief the facts and issues in this complex case before rendering its opinion and order." [citing (Tr. p. 245)].

At no time did petitioners voluntarily or otherwise waive their Fifth Amendment rights; yet, the Court of Appeals precipitously denied them the protection conferred to each and every American citizen by the Constitution of the United States.

2. *The Court Of Appeals Erroneously Applied The Inevitable Discovery Theory.*

The Court of Appeals erred when finding that *Nix* v. *Williams*, 467 U.S. 431, 104 S.Ct. 2501, 2501, 81 L.Ed.2d 377 (1984), was applicable to this case. Specifically, the Court of Appeals rejected petitioners' position that the information obtained as well as the airline tickets and baggage claim checks were the fruit of an illegal custodial interrogation. The Court of Appeals held that these would have been *inevitably* found. The instant case is distinguishable from *Nix* in that here, law enforcement agents committed repeated constitutional violations, culminating in the illegal search, and seizure, of the carry-on handbag which contained the claim checks. Unlike *Nix*, the law enforcement agents demonstrated bad faith and intentional circumvention of the law which they are required to uphold.

As illustrated herein, the Customs Agents have established a *modus operandi* of recurrent violations of travelers' constitutional rights by intentionally violating the constitutional requirements prerequisite to obtaining incriminating evidence and then retroactively attempting to justify such illegal procedure. The bad faith displayed by the Agents is clear and unequivocal. This bad faith element contravenes the *Nix* doctrine of inevitable discovery.

One of the most respected authorities in criminal law has stated as follows:

> For one thing, it is essential that courts not lose sight of the fact "that a mechanical application of the inevitable discovery doctrine will encourage unconstitutional short cuts". Because one purpose of the exclusionary rule is to deter such short cuts, *the "inevitable discovery" rule should be applied only when it is clear that "the police officers have not acted in bad faith to accelerate the discovery"* of the evidence in question. If the rule were

> applied when such a short cut was intentionally taken, the effect would be to read out of the Fourth Amendment the requirement that other, more elaborate and protective procedures be followed (emphasis supplied).[14]

LaFave also states that some opponents of the "inevitable discovery" doctrine assert that it is " 'based on conjecture' and 'can only encourage police short cuts whenever evidence may be more readily obtained by illegal than by legal means,' and thus 'collides with the fundamental purpose of the exclusionary rule.' " LaFave, at p. 381. Petitioners respectfully adopt this contention and incorporate it into their argument that the Court of Appeals erred in tolerating such flagrant abuse of power as that displayed by Customs, and in subsequently justifying the illegal behavior of the Agents with the "inevitable discovery" doctrine established by this Honorable Court in *Nix*. It is inconceivable that the decision of this Court in *Nix* should be used to blanket the manifest disregard for the constitutional rights of travelers manifested by these Agents.

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[14] LaFave, Wayne R., *Search and Seizure: A Treatise on the Fourth Amendment*, 2nd ed., Vol. 4, West Pub. Co., sec. 11.4(a), p. 382; citing 5 *Hofstra L.Rev.* 137, 159, 160 (1976).

CONCLUSION

For the foregoing reasons, this Court should issue the requested writ of *certiorari*.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS,
FIRST CIRCUIT.

No. 91-2143.

UNITED STATES,
APPELLEE,

v.

JOSE MALDONADO-ESPINOSA AND
CARMEN MALDONADO-ESPINOSA,
DEFENDANTS, APPELLANTS.

Heard March 5, 1992.

Decided June 30, 1992.

Juan R. Acevedo Cruz, Hato Rey, P.R., for defendant, appellant Jose Maldonado-Espinosa.

Francisco Acevedo Padilla, Guaynabo, P.R., on brief, for defendant, appellant Carmen Maldonado-Espinosa.

Jose A. Quiles, Asst. U.S. Atty., with whom Daniel F. Lopez-Romo, U.S. Atty., Hato Rey, P.R., was on brief, for appellee.

Before BREYER, Chief Judge, FEINBERG,* Senior Circuit Judge, and SELYA, Circuit Judge.

BREYER, Chief Judge.

Jose Maldonado-Espinosa and his sister, Carmen Maldonado-Espinosa, appeal their convictions for possession with intent to distribute sixty kilograms of cocaine. 21 U.S.C. §§ 841(a)(1), 955 and 18 U.S.C. § 2. They claim that the district court should have suppressed as evidence the cocaine, two airline tickets, and four luggage claim checks. The district court explained in detail why it denied the motions to suppress. *United States* v. *Maldonado-Espinosa*, 767 F.Supp.

1176 (D.P.R. 1991). We find its conclusions are adequately supported in the evidence and in law, and we therefore affirm the convictions.

I. *Background*

On February 28, 1991, government agents at Luis Munoz Marin International Airport in Carolina, Puerto Rico, using a drug-sniffing dog, identified four suitcases as probably containing narcotics; identified the Maldonados, who were bound for Miami, as the suitcases' likely owners; detained, handcuffed, and questioned the Maldonados; opened the suitcases and found the cocaine; asked Carmen Maldonado for the airline tickets; and searched for and found the luggage claim checks in Carmen Maldonado's carry-on bag. The key events, as found by the district court and supported in the record, included the following:

1) Customs Officer Raul Diaz was conducting a training session with his accuracy-certified, drug-sniffing dog, Hershel. Hershel was supposed to pick out "dummy" luggage, which Customs agents had filled with narcotics, from ordinary domestic and international luggage on a luggage conveyor belt. Instead, Hershel "alerted" the agents to the presence of drugs, not in the "dummy" luggage but in two other suitcases.
2) Officer Diaz, on the instructions of Juan Hurtado, his supervisor, put the two suitcases through the Department of Agriculture's x-ray machine. The x-ray revealed bulky packages that might contain drugs.
3) Diaz returned with Hershel to the luggage conveyor belt, where Hershel alerted the agents to two more suitcases. The agents x-rayed these as well. They also appeared to be filled with loaf-shaped packages.

4) Hurtado, noting on the luggage tags, names (Castro and Colon), destination (Miami), and airline (American), went to the gate, where an American Airlines agent recalled dealing with a couple named "Castro" and "Colon." She pointed out Carmen Maldonado in the waiting area.

5) Hurtado approached Carmen and asked her for her ticket. She said her brother had it, and that he was in the men's room. She agreed to wait with Hurtado for Jose. When Jose appeared, Hurtado asked if he could see their tickets. Jose said a "man in a yellow shirt" had them. They agreed to accompany Hurtado to the customs area.

6) Carmen and Jose were placed in separate rooms. They revealed their true names (*i.e.*, Maldonado, not "Castro" and "Colon"). The agents handcuffed them to chairs.

7) Another customs agent, Benjamin Garcia, asked Carmen Maldonado for the tickets. She reached into the pocket of a carry-on bag which was on a table near where she was sitting, and she produced them. Garcia then left the room and showed the airline tickets to Hurtado. He returned and ordered a "security search." Inspector Nidia Alvarez conducted the search, which consisted of frisking Carmen Maldonado, and looking into her purse and carry-on bag which were on the table. Alvarez found the luggage claim checks in the carry-on bag.

8) Garcia then directed Special Agent Rodolfo Salcero and Hurtado to interview Hose, and he called Agents Marilyn Garcia and Leticia Cerrano to interview Carmen. Those agents read the Maldonados their *Miranda* rights, obtained signed waivers, and questioned them.

9) Yet another agent, Drug Enforcement Agent Enrique Nieves, arrived and again read Jose his

Miranda rights. He told Jose that Hershel had alerted agents to the suitcases, and that the x-rays had revealed loaf-shaped packages. Nieves told Jose that, in his experience, such packages contained drugs and that he would get a warrant and open the suitcases unless Jose consented to their being opened. Jose consented. Nieves told Carmen the same thing. Carmen indicated that she did not care if he opened the suitcases because they did not belong to her. Nieves opened the suitcases and found the drugs.

II. *The Seizure of the Drugs*

[1] The district court rejected the Maldonados' claim that the government agents acted unreasonably, hence, unconstitutionally, in seizing the drugs. U.S. Const. amend. IV; *see also United States* v. *Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). It reasoned as follows:

(1) Government agents were acting reasonably in using Hershel at the luggage conveyor belt. *See United States* v. *Place*, 462 U.S. 696, 707, 103 S.Ct. 2637, 2644, 77 L.Ed.2d 110 (1983) (dog sniff not a "search"); *United States* v. *Race*, 529 F.2d 12, 14 (1st Cir. 1976) (random dog sniffing of international luggage does not require particularized suspicion). Hershel, a fully trained drug-sniffing dog, alerted the agents to the Maldonados' suitcases; hence, the government had "probable cause" for a search of the suitcases with a proper warrant. *United States* v. *Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) (dog sniff provides probable cause to obtain warrant to search luggage).

(2) The Customs agents did *not* act reasonably (hence they acted unconstitutionally) in taking x-rays of the luggage, rather than simply obtaining a search warrant. *See United States* v. *$124,570 U.S. Currency*, 873 F.2d 1240, 1244 (9th

Cir. 1989) (warrantless administrative search of luggage at airport limited to purpose of excluding weapons and explosives from planes).

(3) *But* Jose Maldonado voluntarily consented to the opening of his suitcases, while Carmen Maldonado disclaimed ownership of hers.

(4) *And* the unconstitutional x-ray did not play a significant role in obtaining their consent. *Maldonado-Espinosa*, 767 F.Supp. at 1184-87.

(5) Hence, the search was constitutional. *See Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973) (consent exception to warrant requirement).

The Maldonados acknowledge that the dog sniff provided sufficient grounds to obtain a warrant. They take issue, however, with points (3) and (4). They say that their "consent and disclaimer" were not "voluntary" because the unconstitutional x-ray played a critical role in obtaining their "consent and disclaimer." *Wong Sun* v. *United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) ("fruit of poisonous tree" doctrine).

We have reviewed the record, and we find the district court's findings on these matters adequately supported. The Maldonados correctly state that, at the suppression hearing, they *said* they did not consent to the search or disclaim ownership of the luggage. But they cannot overcome the fact that the district court simply did not believe them. The court accepted as true the government agents' account of those events — that Jose Maldonado specifically consented to the search and that Carmen indicated that the suitcases did not belong to her, and that she did not mind if they were opened. These findings, and the district court's description of the underlying events, accurately represent the contents of the record. *Maldonado-Espinosa*, 767 F.Supp. at 1189-92.

The court (assuming the x-ray search was unconstitutional) also found that the x-ray search played no significant role in

obtaining the consent and disclaimer. Rather, in the court's view, the Maldonados consented and disclaimed because they realized that failure to do so would do them no good — the agents would simply obtain a warrant and search the suitcases anyway. In our view, this is a perfectly plausible conclusion to draw from the record. The district court saw the witnesses; it made appropriate credibility determinations, and we cannot say its conclusions were "clearly erroneous." *United States* v. *Cruz Jimenez*, 894 F.2d 1, 7 (1st Cir. 1990).

[2] We do note that the x-ray in this case is rather unusual — it was taken *after* the government already had "probable cause" sufficient to obtain a search warrant. Whether, under such circumstances, the x-ray is or is not a constitutional search, is a matter that the circuit courts have not decided. And, we state explicitly that we do not decide it, for we need not reach the issue. We accept, for purposes of this appeal, the district court's finding that the x-ray played no significant role in obtaining the consent and disclaimer that made the search possible.

III. *The Claim Checks and the Plane Tickets*

[3, 4] The Maldonados argue that the government unlawfully seized the luggage claim checks. They say that Agent Alvarez searched Carmen Maldonado's carry-on bag without a warrant and in the absence of any exigent circumstances that might have justified a warrantless search. The short, conclusive answer to this argument is that government agents had just arrested Carmen Maldonado. They had probable cause for the arrest (as the Maldonados do not deny). *Florida* v. *Royer*, 460 U.S. 491, 506, 103 S.Ct. 1319, 1329, 75 L.Ed.2d 229 (1983); *Race*, 529 F.2d at 14. The carry-on bag was on the table next to her and within reach. And, government agents, when arresting a person, may constitutionally search an arrested person's nearby carry-on bag, without a warrant. *United States* v. *Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38

L.Ed.2d 427 (1973). They may do so whether or not they have reason to fear that the carry-on bag contains a weapon, another threat to their safety, or destructible evidence. *Michigan* v. *DeFillippo*, 443 U.S. 31, 35, 99 S.Ct. 2627, 2631, 61 L.Ed.2d 343 (1979) ("The fact of a lawful arrest, standing alone, authorizes a search.").

The Maldonados also argue that the government had discovered that the airplane tickets were in the same carry-on bag as a result of unlawful questioning. They say that, after Carmen Maldonado was taken to the room, Agent Garcia, *before giving her appropriate self-incrimination warnings*, asked her where the tickets were. And, she indicated that they were in the nearby carry-on bag. This questioning, after detention, the Maldonados add, violated Carmen Maldonado's Fifth Amendment rights. *Miranda* v. *Arizona*, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 1612-13, 16 L.Ed.2d 694 (1966). And, the court should have suppressed any "fruits" of that violation, such as the tickets, and perhaps the claim checks as well. *Wong Sun*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441.

The problem with the Maldonados' argument, however, is that they made no such argument in the district court. Rather, they argued for suppression on Fourth Amendment grounds alone. Had they made their *Miranda* argument, the government might have explored the matter more fully at the suppression hearing. And, undoubtedly, it would have claimed that, irrespective of Agent Garcia's brief initial questioning, the agents would have found the tickets and claim checks *anyway* during the search of the carry-on bag incident to the arrest. Indeed, the record of the suppression hearing indicates that the government agents would "inevitably" have discovered the tickets and checks without the questioning, in which case they would have been admissible whether or not the questioning violated the *Miranda* rules. *Nix* v. *Williams*, 467 U.S. 431, 441-44, 104 S.Ct. 2501, 2507-09, 81 L.Ed.2d 377 (1984). We find that the Maldonados waived their *Miranda* claim;

we add that, given the record, we believe the waiver works no injustice.

The judgment of the district court is *Affirmed.*

APPENDIX B

UNITED STATES DISTRICT COURT,
DISTRICT OF PUERTO RICO.

Crim. No. 91-122(JAF).

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

JOSE MALDONADO-ESPINOSA AND
CARMEN MALDONADO-ESPINOSA,
DEFENDANTS.

June 14, 1992.

Jose A. Quiles-Espinosa, Asst. U.S. Atty., Daniel F. Lopez-Romo, U.S. Atty., District of Puerto Rico, San Juan, P.R., for plaintiff.

Juan R. Acevedo-Cruz, San Juan, P.R., for Jose.

Francisco Acevedo-Padilla, San Juan, P.R., for Carmen.

OPINION AND ORDER

FUSTE, District Judge.

Defendants, Jose Maldonado-Espinosa and Carmen Maldonado-Espinosa, siblings, are charged with possession with the intent to distribute sixty (60) kilograms of cocaine found in suitcases which they checked as luggage aboard an American Airline flight from San Juan, Puerto Rico, to Miami. Defendants seek to suppress the cocaine claiming that its discovery was the fruit of an illegal search. The government concedes that the search was warrantless, but seeks to justify the absence of a warrant on exceptions to the warrant rule: border search or alternatively, search conducted on consent (Mr. Jose Maldonado and abandonment/disclaimer Ms. Carmen Maldonado). We reject the border search theory outright and focus on the consent and abandonment. We must determine whether the outcome of an X-ray search of the

luggage, which we find to be illegal, was "traded upon" by the law enforcement officials in such a way so as to invalidate the consent of Mr. Jose Maldonado. We must determine whether the outcome of the X-ray search was traded upon in such a way as to coerce Ms. Carmen Maldonado's disclaimer.

Facts

We cull the following facts from a full hearing held on the suppression motion.

On February 28, 1991, Customs Officer Raul Diaz was conducting a training session with a drug detection dog named "Hershel" at Luis Munoz Marin International Airport in Carolina, Puerto Rico. The training session consisted of Officer Diaz placing dummy luggage along with actual passenger luggage on conveyor belts within the airport. The dummy luggage was packed with narcotics as a "plant". Diaz would then bring Hershel into proximity with the "plant" so that Hershel could be trained in "alerting" to the presence of contraband narcotics. Hershel, a 1986 graduate of the K-9 training center in Virginia, has been in service in Puerto Rico since 1988 and has successfully certified for accuracy on an annual basis since then. A utilization record, put into evidence, is kept on all of Hershel's "alerts". Officer Diaz has been the sole "handler" of Hershel since the dog began its career.

The particular training session of interest to us was being conducted in an interior area of the airport, but not in the confines of the Customs area. Luggage on the particular conveyor belt had already been checked in for travel, and was headed for a location where it would be segregated by flight into small "carts" or containers which would then be taken to the appropriate airplane for loading. The belt contained luggage bound for both domestic and international destinations, each bag already marked from the check-in point as to its final destination.

At some time around Noon, Hershel alerted to two hard-shell suitcases, neither of which were the prearranged plants, but which appeared to be actual passenger luggage. Officer Diaz contacted his superiors, Inspectors Justiniano and Hurtado. Officer Diaz was ordered to take the bags to the United States Department of Agriculture/Customs enclave. The bags were then subjected to an X-ray search which revealed several kilo-shaped packages, and the absence of clothing or other usual luggage contents. Officer Diaz was ordered to return to the conveyor belt to continue searching. Hershel alerted to two more bags, which were then brought to USDA/Customs, and subjected to an X-ray, which revealed the same presence of kilo-shaped packages and absence of other contents.

Inspector Hurtado examined the name and destination tags on the luggage, and determined that two of the bags carried the name "Rafael Colon" and two carried the name "F. Castro". The tags indicated that the luggage was headed to Miami on a particular American Airline flight scheduled to depart at 1:50 that afternoon. At approximately 12:45 p.m., Inspector Hurtado left the Customs area, went to the gate from which the flight was scheduled to depart. He inquired of airline personnel, asking whether they could identify passengers "Castro" and "Colon". The gate agent told Hurtado that she could, and that she remembered the couple because of a slightly strange occurrence during check-in. Although the two clearly appeared to the flight agent to be travelling together, they had turned down the agent's offer to seat them together. The flight agent then pointed out to Hurtado the area in the waiting room where defendants had seated themselves.

When Hurtado approached, only the woman was there. He was in uniform, and asked to see her plane ticket. She told him that her brother had the ticket, and that he was in the men's room. Hurtado asked if she would be willing to show him (Hurtado) the restroom where her brother had gone, and she agreed. The brother was coming out of the restroom when

Hurtado arrived. Hurtado asked to see the tickets for the flight. The brother informed Hurtado that he did not have the tickets, that instead a "man in a yellow shirt" had them. No yellow shirt man carrying the tickets could be located after a search of the concourse area. Hurtado asked whether the two would accompany him to the Customs area. They assented.

In the Customs area each was placed in a separate room. A patdown for weapons was conducted on each, and no weapons were found. Special Agent Rodolfo Salcedo read each a copy of the Miranda warnings in Spanish, and obtained a written waiver of their rights. Defendants revealed their real names. At some point defendants were handcuffed to the chair in their respective rooms. Supervisor Special Customs agent Benjamin Garcia arrived. He asked Ms. Carmen Maldonado for the tickets. She used her free hand to reach into the carry-on bag and produced them. An inspection of the tickets revealed that they contained no baggage claim stubs. Agent Garcia then ordered Inspector Nidia Alvarez to search the carry-on bag. At that time the claim stubs for the four bags were found.

By mid-afternoon, approximately 3:00 p.m., Drug Enforcement Agent Enrique Nieves had arrived. Mr. Jose Maldonado was in the interview room along with the two brown suitcases bearing the name "Rafael Colon", the name under which Mr. Jose Maldonado was travelling. Ms. Carmen Maldonado was in the interview room along with the two grey suitcases bearing the name "F. Castro." Agent Nieves identified himself to Mr. Jose Maldonado, read him the Miranda warnings again, and began to discuss Mr. Jose Maldonado's situation. Nieves explained that the dog had alerted to the bags. He explained that the bags had been run through an X-ray machine and that kilo-shaped packages had been discovered. He told Mr. Jose Maldonado that in his experience such packages contained cocaine. He told Mr. Jose Maldonado that the suitcase contained what he believed were a large quantity

of drugs. He told Mr. Jose Maldonado that there were two options. Either Nieves could obtain a search warrant, which he would obtain on the basis of the information that he already had, or Mr. Jose Maldonado could consent to the opening of the bags.

Past the point at which Nieves informed Mr. Jose Maldonado of his options, the testimonies of the witnesses diverge, Mr. Jose Maldonado testified that Nieves produced a printed consent-to-search form that Mr. Jose Maldonado refused to sign. According to Mr. Jose Maldonado, Nieves then asked for oral consent, and Mr. Jose Maldonado refused. Nieves went on to have the suitcase opened anyway.

Nieves testified that he did not seek a written consent to search Mr. Jose Maldonado's luggage, since a verbal consent was sufficient. Although he was familiar with the written consent forms which were sometimes used on such occasions, he did not have one available that day. Nieves testified that in his four years as an agent assigned to the airport he had never had an occasion to request a search warrant.

On his direct examination, Nieves testified that after describing Mr. Jose Maldonado's "options", he asked whether these were Mr. Jose Maldonado's bags and whether he could open them. Nieves testified that Mr. Jose Maldonado gestured positively and assented verbally.

The court later recalled Mr. Nieves in order to go into greater detail regarding the precise exchange that took place with regard to the consent. This time, Nieves testified that he asked Mr. Jose Maldonado if these were his suitcases, and that Mr. Jose Maldonado acknowledged, that he nodded, and that he said yes. Nieves asked if Nieves could open the suitcases, and that it would be done in Mr. Jose Maldonado's presence. Nieves testified that Mr. Jose Maldonado hesitated. Nieves asked again, and told Mr. Jose Maldonado that they were going to open the suitcases either with consent or a warrant. Nieves testified that at that point Mr. Jose Maldonado said yes and gestured affirmatively. Nieves then ordered Diaz

to open the suitcases, which was accomplished with a knife, since the cases were locked.

We give no weight to Mr. Jose Maldonado's testimony, since we find it not credible. Mr. Jose Maldonado admitted that he lied to Hurtado in the concourse regarding the tickets and the "man in the yellow shirt" as a way to, as he described it, buy time so he could figure out what was going on. This evidence of a willingness to blatantly lie to officials combined with Mr. Jose Maldonado's demeanor while testifying leads us to find him a wholly-incredible witness.

Nieves testimony on the consent of Mr. Jose Maldonado was fairly consistent and was supported by all the other agents on the scene. We find the Mr. Jose Maldonado consented verbally, affirmatively, and in a not ambiguous manner to the opening of the suitcases bearing his alias.

We leave for the body of the opinion the question of whether the consent given by Mr. Jose Maldonado was given voluntarily, or was the product of the illegal X-ray search.

The testimony regarding Ms. Carmen Maldonado was less clear. From the defense side, Ms. Carmen Maldonado gave almost exactly the same testimony as her brother, including regarding a request by Nieves first for a written consent and then for oral consent, both of which Ms. Carmen Maldonado says she rejected. We find Ms. Maldonado not to be a credible witness. Her demeanor and her near verbatim recital of her brother's testimony leave us little choice but not to find her believable. We base our findings primarily on the government's witnesses. The one fact that she testified to which we found to be spontaneous and believable was that she was repeatedly told, prior to the opening of the suitcases, about the contraband-appearing packages and the apparantly large volume of contraband contained within.

Nieves himself testified he told Ms. Carmen Maldonado about the results of the dog sniff and the X-rays. On direct examination he testified that at his request for oral consent, Ms. Carmen Maldonado said that the bags were not hers.

Nieves testified that Ms. Carmen Maldonado told him that since they were not hers, Nieves could open them. He testified that he understood by her gestures what she meant. Special Agent Marilyn Garcia, who witnessed the discussion, confirmed that Ms. Carmen Maldonado said that the suitcases were not hers, but contradicted Nieves on the point about whether Ms. Carmen Maldonado went on to actually consent. Agent Garcia testified that Ms. Carmen Maldonado never actually verbally consented to the search, but that Agent Garcia felt that in her opinion, Ms. Carmen Maldonado consented by gesture.

On cross-examination defendants pointed out to Nieves that in the testimony before the Grand Jury, Nieves had testified to the following regarding the consent:

> And I requested a similar consent from Ms. Maldonado. Again, there was a clarification as to the identify, the ownership of the suitcases. She accepted and consented to opening the suitcases.

(Defendants' Exh. 4, p. 4). Before the Grand Jury, then, Nieves did not refer to disclaimer or abandonment at all, but stated that Ms. Carmen Maldonado accepted ownership and affirmatively consented to the search.

In addition, defendants pointed out that in the arrest report filled out by Nieves, only a straightforward consent is mentioned, not the rejection of ownership claimed by Nieves at the hearing on suppression.

On the recall for clarification by the court, Nieves testified that upon reviewing his Grand Jury testimony, he now believed that what Ms. Carmen Maldonado had actually given was a combination of consent and abandonment. He admitted that it was difficult to remember what had occurred, but that the message he understood from her was "open them", and that he got that impression from both words and gestures, both a disclaimer of ownership and a consent to search that which was not hers anyway. He ended his testimony by stating that Ms. Carmen Maldonado was denying

ownership, consenting to the search and abandoning the bags at the same time.

Ultimately, we find that at least a disclaimer was made. At least to that extent, Agent Marilyn Garcia and Agent Nieves support each other in testifying that Carmen Maldonado abandoned the bags. In addition, we note that at the hearing Carmen Maldonado continued to deny ownership of the bags, strengthening our finding that she made such a disclaimer on the day of her arrest.[1] We make no finding as to whether a consent followed the disclaimer, since the testimony on that point was vague and contradictory, and since the disclaimer obviates the need for use to reach the question as to consent. We go on later in the opinion to determine, looking at all the circumstances, including the effect of the prior X-ray, whether we can find the disclaimer to be voluntary, or whether it was the product of coercion.

Border Search

[1] The government seeks to characterize the various interferences with the defendants as part of border search activities, and to thereby enjoy the free reign for searching given to Customs officials in executing their duties in protection of the border. *United States* v. *Braks*, 842 F.2d 509 (1st Cir.1988) (degrees of suspicion required to conduct both routine and non-routine border searches). We reject this proposition outright.

The government grounds its position on the fact that the conveyor belt in question carried both domestic and foreign luggage in what the government describes as a "jumble". The

[1] We assumed Carmen Maldonado's "standing" for purposes of granting the hearing on the basis of her control over the suitcases which was evidenced from the claim tags corresponding to her alias. As discussed in this opinion at pages 1191-1192, the distinction between a standing inquiry and a substantive Fourth Amendment analysis is often more confusing than instructive.

luggage was on the short "trip" that all luggage checked into the airport, both foreign and domestic, must take before being loaded onto planes. The luggage was not in a designated Customs area. The government admits that the luggage in this case was strictly domestic and that it was handled as such by the destination tags attached to it. In fact, it was the identification on the luggage itself which lead the investigators to the *domestic* gate of American Airlines where they found the Maldonados.

The government's argument, it seems, would apply to any piece of luggage checked for flight to a domestic location at the Luis Munoz Marin International Airport. According to the government's argument, any domestic luggage checked in San Juan could be searched without warrant under the border exception, since all such luggage, on its journey from curb to airplane, becomes mixed at some point with international luggage. In essence, the government considers any part of the airport where international luggage may be found to be the "border" for purposes of even suitcases known by officials to be on a strictly domestic route. We find this position to be insupportable.

The government concedes, as it must, that a flight from San Juan to Miami is domestic, and that a person taking such a flight is engaged in domestic travel. The Supreme Court has rejected the concept that there is an "intermediate border" between Puerto Rico and the mainland for Fourth Amendment purposes. *Torres* v. *Puerto Rico*, 442 U.S. 465, 474, 99 S.Ct. 2425, 2431, 61 L.Ed.2d 1 (1979); *Lopez Lopez* v. *Aran*, 844 F.2d 898, 902 (1st Cir.1988) (trip from Puerto Rico to the Continental United States is not an "entry" for immigration purposes). The government also concedes that the luggage, when interfered with for the first time (on the conveyor belt) was not within the Customs enclosure through which all foreign travellers must pass.

Instead of trying to argue that the defendants and their luggage were engaged in international travel, or that the luggage

was located in the formal border area for Customs purposes, the government argues that the luggage, mixed with international luggage, entered a zone that was the functional equivalent of the border area. It is the government's position, which we find to be legally erroneous, that luggage in this "extended" border area could be searched without a warrant just as if it was crossing the actual border itself, even though officials knew that the luggage was engaged in strictly domestic travel. As we will demonstrate, it is not enough to justify a warrantless search of luggage merely to show that the luggage was located in an area which might be defined as the elastic border.

In *United States* v. *Carter*, 760 F.2d 1568 (11th Cir.1985), the court upheld a warrantless search of a small airplane which landed on a deserted Florida airstrip. The plane had been picked up by Customs radar north of Bimini Island heading for Florida. It was not sending out a transponder signal and had filed no flight plan in the United States. After landing, the occupants of the plane fled the scene, and interfered with a Customs plane's attempt to land. Once the officials made it to the ground, the plane was still there but all persons were gone. The Customs officers searched the plane and obtained evidence which was admitted at trial. The court found the aircraft validly subject to a border search, although the airstrip was in the interior of the state. In so doing, the court set out the three elements necessary for a border search conducted at a location other than the border:

> A border search may be conducted away from the actual border if: (1) there is a reasonable certainty that the object of the search has just crossed the border, (2) the search takes place at the first practicable point after the border was crossed, and (3) there has been no time or opportunity for the object of the search to have changed materially since the time of the crossing.

Carter, 760 F.2d at 1576, *citing*, *United States* v. *Garcia*, 672 F.2d 1349, 1365-66 (11th Cir.1982); *United States* v. *Corral-*

Villavicencio, 753 F.2d 785, 788 (9th Cir.1985) (reasonable certainty that object crossed border needed to justify eventual border search.).

Here the government concedes that the Customs officials knew that the suitcases were travelling in a strictly domestic context since they were checked in at San Juan on the way to Miami. Not only does this case fail to satisfy the "reasonable certainty of having crossed the border" test as set out in *Carter* and *Corral-Villavicencio*, it specifically negates that a border crossing occurred.

The government relies for support of its position on *United States* v. *Glaziou*, 402 F.2d 8 (2nd Cir.1968), *cert. denied*, 393 U.S. 1121, 89 S.Ct. 999, 22 L.Ed.2d 126 (1969). In *Glaziou* two French seamen were observed leaving an enclosed international pier area along the Brooklyn waterfront. The two continued on a public street. Customs officials on patrol along the waterfront stopped the seamen and asked for their seamen's identification cards. One of the officers noticed a bulge around the waist of one of the seamen and grabbed at it. The bulge turned out to be heroin. The seaman sought to suppress the evidence as the fruit of an illegal search. The Court found that the street was a part of the "border area" for purposes of Customs investigation.

In *United States* v. *Ramos*, 645 F.2d 318 (5th Cir. Unit B 1981), a situation similar to the one in *Glaziou* arose. Ramos arrived in Miami on a flight from Bogota, Columbia. He passed through Customs without incident. A short time later another passenger on the same plane was found to be carrying cocaine on her person along with documents indicating a connection to Ramos. Approximately thirty minutes after Ramos passed through Customs, Customs officials left the Customs enclosure and located Ramos. He was in the airport, having checked into the airport hotel, but apparently having not yet gone to his room. He was dressed the same and carried the same briefcase. The Customs officials asked him to return to the Customs area, to which he agreed. A routine patdown

revealed cocaine packages taped to his body. The court upheld the procedure, finding that the two essential criteria were:

> (1) The degree to which the traveler has been assimilated into the mainstream of domestic activity, and (2) whether the evidence preponderates that the contraband seized has actually crossed the border.

Ramos, 645 F.2d at 320. Since Ramos and his accoutrements did not appear to have suffered any alterations since he and they had actually passed from international territory, and he was still in the general airport area, the court found the facts to support the reach of Customs officials beyond their confined area. *See also, United States* v. *Ogueri*, 798 F.2d 452 (11th Cir. 1986) (defendant passed Customs in airport without incident, walked twenty yards into airport concourse, and was recalled for second search).

In all of these extended border cases, a common theme predominates. The facts must support the conclusion that Customs officials must have at least a reasonable suspicion that a package or person searched outside the confines of the border proper did actually cross the border. The facts in this case before us do not support such a conclusion, but rather preclude it as a possibility.

The so-called "checkpoint" cases offer the government no more support. The border patrol maintains permanent checkpoints on roads leading from the border at which a vehicle may be stopped and questioned briefly even if there is no reason to believe that the car contains illegal aliens. *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 587, 103 S.Ct. 2573, 2579, 77 L.Ed.2d 22 (1983); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (fixed checkpoints for auto stops on highway leading from border). The occupants of the car may be required to prove their citizenship or other right to be in the country. *Martinez-Fuerte*, 428 U.S. at 558, 96 S.Ct. at 3083; *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). The officials may ask the occupant to explain sus-

picious circumstances. *United States* v. *Benitez*, 899 F.2d 995 (10th Cir.1990); *United States* v. *Johnson*, 895 F.2d 693 (10th Cir.1990).

While it is true that the checkpoint cases "do not require a showing that the particular item or person searched has actually crossed the border," *Jasinski* v. *Adams*, 781 F.2d 843, 847 (11th Cir.1986), the "[p]ermissible search and seizure is more restricted in this context than in any other [border or expanded border] context." *Jasinski*, 781 F.2d at 847. The heightened ability to stop and inquire at checkpoints away from the border does not lessen the strictures on a vehicle or luggage search conducted there. Those searches still require the probable cause or consent which would be required for a vehicle search anywhere in the interior. All the checkpoint gives to Customs officials is the right to make stops and inquiries without any particularized suspicion at a point away from the border where they would ordinarily be prevented from doing so. If probable cause to search develops as a result of the stop and inquiry, the official is in no better or worse position than if the probable cause had arisen on a routine highway traffic violation stop elsewhere in the interior, *United States* v. *Ortiz*, 422 U.S. 891, 896-97, 95 S.Ct. 2585, 2588-89, 45 L.Ed.2d 623 (1975); *Benitez*, 899 F.2d at 998. *See California* v. *Acevedo*, — U.S. —, 111 S.Ct.1982, 114 L.Ed.2d 619 (1991) (probable cause to search particular luggage within car falls within general automobile exigency exception to warrant requirement). Therefore, while the checkpoint cases do provide an example where general screening for Customs purposes is allowed even absent a particularized suspicion that the border has been crossed, the checkpoint rationale allows for a very limited intrusion, and

cannot possibly justify a warrantless search of a suitcase in an airport context.[2]

We find that the extended border search rationale is completely inappropriate to the case at bar. The cases show that the doctrine does not simply extend the Customs enclosure a certain number of feet or yards into other areas of an airport, and thereby justify all standard border procedures to all persons or packages found within that radius. Rather, the court is required on the facts of each case to determine whether there is a reasonable certainty that the person or container involved has crossed the border or may do so in the immediate future.[3]

Since the procedure taken in this case cannot be justified on the basis of any border search exception, we go on to examine the proceedings of February 2, 1991 with reference to non-border doctrine.

Dog Sniff

The entire scenario was triggered by the dog sniff of defendants' luggage. The Fourt Amendment "protects people from unreasonable government intrusions into their legitimate expectation of privacy," *United States* v. *Chadwick*, 433 U.S. 1, 7, 97 S.Ct. 2476, 2481, 53 L.Ed.2d 538 (1977). A person possesses a privacy interest in personal luggage. *Id.* at 13, 97 S.Ct. at 2484-85. Exposing luggage to a trained narcotics dog, however, has been held not to be a "search" within the meaning of the Fourth Amendment. *United States* v. *Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989)

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[2] The Supreme court has recently reaffirmed its position that law enforcement officers seeking to search luggage in an airport, although such luggage is itself movable, cannot rely on the same exigent circumstances exception to the warrant rule as has been applied to automobiles. *Acevedo*, — U.S. at —, 111 S.Ct. at 1985.

[3] We take no position on whether luggage marked for foreign destinations found in the same area as the luggage in this case could be returned to the border enclosure and subjected to a border search.

(dog sniff test used as probable cause to obtain warrant to open luggage); *United States* v. *Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984) (dicta affirms that *Place* held that sniff test not a search); *United States* v. *Place*, 462 U.S. 696, 707, 103 S.Ct. 2637, 2644-45, 77 L.Ed.2d 110 (1983); *United States* v. *Osvaldo Rodriguez-Morales*, 929 F.2d 780, (1st Cir.1991) (dog sniff of automobile not a search); *United States* v. *LaFrance*, 879 F.2d 1 (1st Cir.1989) (canine sniff of Federal Express package not a search); *United States* v. *Sklar*, 721 F.Supp. 7 (D.Mass.1989) (dog sniff of Federal Express package). *United States* v. *Germonsen-Garcia*, 712 F.Supp. 862 (D.Kan.1989) (dog sniff of luggage at airport). In *Place*, a traveller in an airport aroused the suspicions of law enforcement personnel. When they approached the suspect, that suspicion increased, on the basis of statements made by the suspect. Still, full-blown probable cause to arrest had not yet developed. Acting only on reasonable suspicion, the law enforcement personnel seized the luggage which belonged to the suspect long enough to subject it to a canine-sniff test. The test indicated the presence of illegal narcotics. The bag was then held until a warrant could be obtained. The court held that the seizure of the bag on no more than reasonable suspicion in order to perform the sniff test could be justified under *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), which allowed police officers to make a short detention and frisk of a person on the street on less than probable cause so long as the police had a reasonable, articulable suspicion that criminal activity was afoot, *Terry*, 392 U.S. at 22, 88 S.Ct. at 1880-81.

The Court in *Place*, having found justification for the temporary seizure of the luggage, then held that the canine sniff of the detained bag, although it did impart to the police information about the contents, was not a search since it was so minimally intrusive. The Court pointed out that the sniff did not require the actual opening of the bag, and would not

expose noncontraband items to public view. *Place,* 462 U.S. at 707, 103 S.Ct. at 2644-45.

There is precedent to the effect that although the *Place* court held that subjecting the luggage to a sniff is not a search within the Fourth Amendment, it must still be preceded by at least an individualized reasonable suspicion regarding the particular luggage involved. In *Place* itself, as in many of its progeny, the Court had to find articulable reasonable suspicion prior to the sniff since those cases involved a *detention of the luggage in order for* the dog sniff to be conducted. Those courts did not face the question of whether the dog sniff can be conducted randomly, with no particularized suspicion, where circumstances allow such sniffing with no interference with the luggage or the luggage's owner. Our situation is just such a case, since the dog, sniffing along luggage on a conveyor belt, alerted before any action was taken against the bag at all. As the Eighth Circuit phrased the issue: "[I]f we assume that a canine sniff is performed in such a manner that no detention whatsoever of the luggage were required, would the Fourth Amendment demand that *any* prior suspicion exist that the luggage may have contained contraband?" *United States* v. *Beale,* 731 F.2d 590 (8th Cir.1983). The Eighth Circuit concluded that prior suspicion regarding the particular piece of luggage would be required. We choose not to follow that holding.

First, there is nothing in *Place* itself which militates in the direction taken by the Eighth Circuit. The *Place* Court's concern regarding the suspicion necessary to "*Terry*-stop" the luggage was clearly directed at whether that *detention* was justified. The Court did not have before it the question of a suspicionless dog sniff.

[2] Second, it would appear that our Circuit sanctions random dog sniffing of the type performed here. In *United States* v. *Race,* 529 F.2d 12, 14, n. 2 (1st Cir.1976), a Customs agent with a drug detection dog was randomly inspecting an American Airlines warehouse where domestic and interna-

tional cargo was located at Logan Airport when the dog alerted to crates later found to contain marijuana. The First Circuit found nothing impermissible about the suspicionless sniffing. As the court stated "[w]e can discern no fourth amendment issue in the use of a dog for a routine check of commingled international and domestic freight in an airport warehouse." *Race*, 529 F.2d at 14, n. 2.

In *United States* v. *Quinn*, 815 F.2d 153 (1st Cir.1987), on the other hand, the court wrote that "(t]o be entitled to use a dog for purposes of making a sniff test, the officers were required merely to have had reasonable suspicion that the car contained narcotics...." (Citing to *Place*).

We think *Race* survives *Quinn* and applies directly to the case at bar. In *Race*, the driving factor in the case appears to have been that the Customs agent was legitimately canvassing the area due to the presence of international luggage. Such a scenario supplants the need for particularlized suspicion as referred to in *Quinn*.

That the general requirement of particularized suspicion can be supplanted has been revisited recently. In *United States* v. *Rodriguez-Morales*, 929 F.2d 780 (1st Cir.1991), the First Circuit, referring to both *Quinn* and *Race*, held that the canine sniff of the exterior of an automobile already legitimately within the custody of the police was acceptable. The *Rodriguez* court held that "[s]o long as the automobile is lawfully impounded, the canine sniff test can be performed without any showing of reasonable suspicion." Like *Race*, then, the *Rodriguez* court found extenuating circumstances (that the car was already in police custody) that would obviate the need for particularized suspicion prior to the use of a sniffing dog.

We note that at least one circuit has read *Place* in such a way as to do away almost entirely with the need for particularized suspicion prior to dog sniffs. *United States* v. *Moralez-Zamora*, 914 F.2d 200 (10th Cir.1990). In *Moralez-Zamora*, dogs alerted to an auto stopped by police at a roadblock.

While the court upheld that procedure, it specifically noted that random dog sniffs at stop lights, or dogs roaming the streets might require a different result.

We hold that the random sniffing in this case, as in *Race*, was legal. Our holding is limited. We take no position on random dog sniffing in contexts other than the specific situation which we face today: random sniffing of airport luggage in areas not frequented by the public that contain both domestic and international luggage. Were the luggage strictly domestic, were the sniffing done randomly in and around the public concourse area of the terminal, or were any of the other factors different, we might hold differently. We do not intend to sanction, for instance, the random greeting of passengers at the airport curbside by uniformed officials with sniffing, growling teams of german shepherds, since such procedures would surely trigger other concerns. *Horton* v. *Goose Creek Independent School District*, 690 F.2d 470 (5th Cir.1982), *cert. denied*, 463 U.S. 1207, 103 S.Ct. 3536, 77 L.Ed.2d 1387 (1983) (Pre-*Place* holding that large dogs sniffing school children is an unreasonable search).

X-ray of Luggage

[3,4] Following the identification of the bags by the dog, they were taken to the Customs Area and run through an X-ray machine, at which point the kilo-shaped packages indicating the presence of cocaine were observed.

The ubiquitous warrantless airport X-ray is a search for purposes of the Fourth Amendment. It is justified as an administrative procedure, an exception to the warrant rule tolerated as necessary to insure safety in air travel. *United States* v. *$124,570 U.S. Currency*, 873 F.2d 1240 (9th Cir.1989); *United States* v. *Herzbrun*, 723 F.2d 773 (11th Cir.1984); *United States* v. *Albarado*, 495 F.2d 799 (2nd Cir.1974); *United States* v. *Davis*, 482 F.2d 893 (9th Cir.1973).

As set out by the seminal *Davis* case, *supra*,

> Screening searches of airline passengers are conducted as part of a general regulatory scheme in furtherance of an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijacking. The essential purpose of the scheme is not to detect weapons or explosives or to apprehend those who carry them, but to deter persons carrying such material from seeking to board at all.

Davis, 482 F.2d at 908.

In practice, security personnel,[4] acting pursuant to federal regulations, (14 C.F.R. § 108.9 (1988) have the right to submit every piece of luggage destined to enter an airport to an X-ray search. *U.S. Currency*, 873 F.2d at 1242. Any indication on the X-ray screen that the luggage contains something which appears to be dangerous to the flight, or which cannot be identified as harmless, renders the luggage subject to a full hand search until the object can be positively identified as harmless. *Herzbrun*, 723 F.2d at 777, *citing to United States* v. *Clay*, 638 F.2d 889 (5th Cir. Unit B), *cert. denied*, 451 U.S. 917, 101 S.Ct. 1996, 68 L. Ed.2d 310 (1981).

It has long been recognized that in the course of conducting a justified administrative search, screeners may uncover contraband completely unrelated to the purposes for which the administrative search was conducted, and such contraband can be admitted against the person in court. *Abel* v. *United States*, 362 U.S. 217, 80 S.Ct.683, 4 L.Ed.2d 668 (1960).

It has *as* long been recognized that the danger exists that police will exploit that administrative search exception to engage in general contraband searches, and in that way circumvent the usual strictures of the Fourth Amendment. *Abel*, 362 U.S. at 230, 80 S.Ct. at 692-93. In *Davis*, the court warned of the fear "that the screening of passengers and their

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[4] *Davis* also held that airport security personnel perform a governmental purpose which constitutes state action.

carry-on luggage for weapons and explosives will be subverted into a general search for evidence of crime." *Davis*, 482 F.2d at 909. As the Ninth Circuit put it, "[t]he risk that administrative searches will be infected by general law enforcement objectives, and the concomitant need for the courts to maintain vigilance, is a recurrent theme in our cases and those of other courts." *U.S. Currency*, 873 F.2d at 1244, *citing to United States* v. *Pulido-Baquerizo*, 800 F.2d 899, 902 (9th Cir.1986) ("a visual inspection and limited hand search of luggage which is used for the purpose of detecting weapons or explosive, and not in order to uncover other types of contraband is a privacy intrusion we believe free society is willing to tolerate"); *United States* v. *Epperson*, 454 F.2d 769, 771 (4th Cir.), *cert. denied*, 406 U.S. 947, 92 S.Ct. 2050, 32 L.Ed.2d 334 (1972) ("the search for the sole purpose of discovering weapons and precriminal events, fully justified the minimal invasion of personal privacy by magnometer").

In *U.S. Currency*, Customs had set up a system at the Seattle airport in which Customs would pay screeners who conducted the weapons safety check on domestic passengers and luggage a $250 bonus for discovery of sums of currency in excess of $10,000. The court suppressed a load of currency[5] discovered during the course of that process. The court noted that the screeners have broad discretion to determine the depth of their inquiry into a given piece of luggage, and that the incentive to search for non-weapon evidence of crime in order to win a reward would result in far more rigorous and intrusive searches than actually necessary to fulfill the administrative objective. "It effectively transforms a limited check for weapons and explosives into a general search for evidence of crime." *U.S. Currency*, 873 F.2d at 1247.

Therefore, we see that the airport X-ray cases do not sanction a general right to X-ray any bag found in the airport to uncover the evidence of criminal activity. Airport X-ray

[5] Other subsequent fruits of the currency discovery were also suppressed.

searches enjoy their administrative exception to the warrant rule only so far as they are conducted to further the compelling adminstrative purpose of keeping weapons and other items dangerous to flight off the aircraft. *U.S. Currency*, 873 F.2d at 1244.

In our case, the government does not even urge that an administrative objective was to be served by the search. The X-ray was conducted purely to confirm and clarify the existence of drug contraband in the suitcases already identified by the dog. The administrative search rationale is completely inapposite and may not be relied on here.

On the Horizon

Although we recognize that it is not the current state of the law, we must note that it is the heartfelt conviction of this court that where an administrative search regime is in place and sanctioned by the courts as truly necessary to fulfill an important governmental purpose, the lowering of privacy expectations resultant from the procedure should justify general, non-administrative searches of persons and personal effects already subject to the administrative search. The non-administrative searches would have to be no more intrusive than the sanctioned administrative procedure already in place. A passenger who goes to the airport, already facing an administrative X-ray search, cannot in any meaningful way be said to retain a reasonable expectatation that his or her privacy will not be invaded at least to the degree of the minimally intrusive procedure of an X-ray, *Katz* v. *United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (seminal case explaining privacy interest).

We think most people who fly expect, while packing, that the bags they pack may well be open to public view once at the airport. An instrument as innocuous as a hair dryer may trigger a publicly viewed hand search, which is perfectly legal. It seems to us a pure abstraction to assert that a person

retains a "privacy interest" in a bag as to one type of search, but not another. Once the interior of luggage must be opened to scrutiny for the administrative purpose, the privacy interest in the contents as therein packed seems to us irrevocably lost.

We would not advocate that positive evidence of crime culled from any warrantless X-ray would then justify a full-scale warrantless search. Instead, it would merely provide the probable cause for the bag to be held and the warrant to be obtained. In that way our proposed warrantless contraband search procedure would be no more intrusive, and tread no more deeply into reasonable privacy expectations that the administrative search already sanctioned. So long as the courts carefully police the areas deemed ripe for administrative searches to be certain that the police does not expand them only to amplify general law enforcement purposes, then those areas in which administrative searches will lower privacy interests and allow for the searches discussed here will not unduly proliferate. In short, we find it not unreasonable to imagine the future adoption of a doctrine which holds that privacy expectation, once lowered by legitimately required administrative searches, are not suddenly regained because a new searcher approaches the luggage with a different purpose.

But that is not the current state of the law. The X-ray of defendants' luggage was completed in contravention of the Fourth Amendment. We move on to determine whether the fruit of this illegality (the information drawn from the X-ray screen) tainted any of the later evidence discoveries which defendants seek to suppress.

Probable Cause to Arrest

[5,6] Defendants concede that they cooperated voluntarily with the officials during the concourse/gate area discussions, and that they went to the Customs area of their own volition. Shortly thereafter, however, defendants were handcuffed to

the chairs in their respective rooms and were read the Miranda warnings. We find that a full custodial arrest began at that point. Even ignoring the information gained from the X-ray, we believe that the arrests were supported by probable cause. *United States* v. *Russell*, 919 F.2d 795 (1st Cir.1990) (listing of First Circuit probable cause cases).

In dicta in *Florida* v. *Royer*, 460 U.S. 491, 506, 103 S.Ct.1319, 1329, 75 L.Ed.2d 229 (1983), the Supreme Court, suggesting that the government should have submitted a particular piece of luggage to a dog sniff, stated that "a positive result [an alert by the dog] would have resulted in [the suspect's] justifiable arrest on probable cause." *United States* v. *Knox*, 839 F.2d 285, 294, n. 4 (6th Cir.1988) ("We would point out that, under *Royer*, the positive reaction of the Narcotics Unit dog alone would have established probable cause to not only search defendants' luggage, but to arrest them immediately"),[6] *cert. denied*, 490 U.S. 1019, 109 S.Ct. 1742, 104 L.Ed.2d 179 (1988). In *Race*, the First Circuit found that probable cause to arrest was proven with evidence of a strong alert by a narcotics dog, evidence that the dog was reliable, and evidence linking the container to the individual arrested. The Ninth Circuit has emphasized the requirement that where the government seeks to show probable cause by means of a dog sniff alone, there must be a showing of the reliability of the particular dog in question. *United States* v. *Fernandez*, 772 F.2d 495, 498, n. 2 (9th Cir.1985); *United States* v. *Spetz*, 721 F.2d 1457 (9th Cir.1983).

In our case, all aspects of probable cause on a dog sniff were proven. The dog alerted to the bags. The airline personnel pointed out the defendants as the individuals with the same names as the identification tags on the luggage. At the hearing before this court the government produced evidence of the

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[6] Several First Circuit cases have found probable cause to seize a package long enough to get a warrant on the basis of a dog sniff. *United States* v. *Giannetta*, 909 F.2d 571 (1st Cir.1990); *United States* v. *LaFrance*, 879 F.2d (1st Cir.1989).

dog's training and reliability, including records of his "alerts" over a substantial period.

Although we would find the dog sniff alone to be sufficient, we have more in this case. Added to the dog sniff we also have the suspicious behavior of the defendants which surely heightened the belief by the law officers that the defendants were engaged in illegal activity. First, the airline flight agent thought it strange that although they were travelling together, the man turned down an offer that they be seated together on the plane. Second, defendants could not produce the airplane tickets for the flight which they were about to take, and fabricated a story about a "man in a yellow shirt." While these phenomena on their own would be proof of almost nothing, added to the positive dog alert they heighten the probability that defendants had undertaken a course of action which they were trying to conceal.

Carry-on Bag Search

[7] A small carry-on within Ms. Carmen Maldonado's immediate reach was searched, revealing the four luggage stubs which corresponded to the luggage at issue in this case.[7] Since we have found that the arrest was based on probable cause, we find that that search for evidence of crime was validly incident to the lawful arrest. *United States* v. *Robinson*, 414 U.S. 218, 94 S.Ct.467, 38 L.Ed.2d 427 (1973); *Chimel* v. *California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

Although we find the search legal, we must discuss and dismiss the government's attempt to portray the search for the claim tags as part of a valid "security search". Agent Garcia testified that when he arrived at the scene he obtained the

[7] Since we find as a matter of fact that Carmen Maldonado voluntarily reached into the carrying bag to produce the plane tickets themselves to Agent Garcia, there is no question of an illegal search with regard to the plane tickets.

plane tickets, but that the baggage stubs were missing. Although the defendants had already been subjected to a security check (a fact which Garcia says he did not know, though it would have been against policy to leave defendants in the rooms without conducting such a check) he ordered that Inspector Alvarez conduct a "security check for weapons" on the carry-on bag within Ms. Carmen Maldonado's control. Inspector Alvarez complied, and produced the baggage stubs.

It is hard to imagine a clearer example of a pretextual search. Garcia sent Alvarez into the bag in order to find the missing bag tags, clear and simple. Even if the order to make a security check had been made with a security purpose legitimately in mind, the seizure of four small tags of paper would never be justifiable as a by-product of a mere security check. A security check of a suspect being detained only on reasonable suspicion, conducted in order to assure that the individual is not in possession of any objects which might be used offensively against the officer conducting the investigation, can never justify the seizure of evidence of the type taken here. *Terry, supra.* The security check rationale failing, only full probable cause prior to the carry-on bag search was sufficient to legalize it, since "[i]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification." *Sibron* v. *New York*, 392 U.S. 40, 86 S.Ct. 1889, 20 L.Ed.2d 917 (1968); *Smith* v. *Ohio*, 494 U.S. 541, 110 S.Ct. 1288, 108 L.Ed.2d 464 (1990).

Mr. Jose Maldonado's Consent

Since we find as a matter of fact that Mr. Jose Maldonado gave consent to have the two suitcases bearing his alias opened, our only question is whether that consent was valid. We must determine whether, given the "totality of the circumstances," including in this case the fact that the results of an illegal search were made known to Maldonado, his consent can be found to be "voluntary." *Schneckloth* v.

Bustamonte, 412 U.S. 218, 227, 93 S.Ct. 2041, 2047-48, 36 L.Ed.2d 854 (1973). Looked at in another way, we must determine whether the results of the X-ray, communicated to Mr. Jose Maldonado, influenced or coerced his consent in a matter that renders the consent a "fruit of the poisonous tree." *Wong Sun* v. *United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); W.R. LaFave, *Search and Seizure, 2nd Ed.*, § 8.2(d) (discussing differing methods used by courts to handle effect of prior illegality on consent which follows).

[8] The mere fact that police gain information from a prior illegality which sets them in the direction of seeking a particular consent is not enough to make the consent given an exploitation of the prior illegality. In *United Stated* v. *Carson*, 793 F.2d 1141 (10th Cir.), *cert. denied*, 479 U.S. 914, 107 S.Ct. 315, 93 L.Ed.2d 289 (1986), Carson was hunting doves. Possession of the doves was made illegal by migratory bird treaties. While Carson was out in the field hunting, a sheriff searched some closed containers left behind by Carson, and discovered recently-killed doves. The search went unnoticed by Carson. The sheriff left, but returned a short time later. Without telling Carson of the prior illegal search, the sheriff asked for Carson's consent to search the containers, which was given. The Tenth Circuit held that the subsequent consent was voluntary, and that fact that it was *requested* by the sheriff only because of the information obtained in the first search did not make it any less voluntary. *Carson*, 793 F.2d at 1147. The court relied on *Wong Sun* for support, pointing out that evidence is not inadmissable solely because *but for* the illegality the evidence would not have come to light. *United States* v. *Sheppard*, 901 F.2d 1230 (5th Cir.1990); *United States* v. *Fike*, 449 F.2d 191 (5th Cir.1971). A consent voluntarily given whose only relationship to the prior illegal act is that the police would not have sought the consent but for the illegal search is "sufficiently distinguishable" from the prior illegality as to not render the second tainted by the first. *Wong Sun*, 371 U.S. at 487-88, 83 S.Ct. at 417-18; *Carson*,

793 F.2d at 1149. As stated in *Carson*, "[t]he police officers' reasons or basis for asking for defendant's consent is irrelevant to the 'exploitation' issue unless the manner in which the police officers request consent renders defendant's consent involuntary." *Carson*, 793 F.2d at 1149.

The "manner" in which the request may render the consent involuntary may include trading on the illegally-obtained information by informing the suspect of the results of the prior search. In *Carson*, the court was careful to point out that "Carson ... was not aware of the initial search ..." before he gave his consent to the second search. "There is no evidence in the record showing that the officers used information obtained in the prior illegal search to coerce Carson into consenting to the subsequent search. Carson waived his Fourth Amendment right by voluntarily consenting to a search, independent of the prior police activity of which he did not know." *Carson*, 793 F.2d at 1155.

[9] In the case before us, Mr. Jose Maldonado was fully informed of the prior illegal search of his luggage. Agent Nieves testified to having specifically told Mr. Jose Maldonado while seeking his consent about the results of the X-ray, about the kilo-shaped packages that were observed, about how in his (Nieves') experience, packages of that shape contained cocaine. Nieves told Mr. Jose Maldonado that what had been observed looked like "a lot of drugs."

On the one hand this looks very much like the kind of coercion by the direct use of the illegally received information which could be characterized as an "exploitation" rendering the consent involuntary. On the other hand, the message conveyed was simply that the agents knew of the existence of drugs in the bag and that they would receive a search warrant if consent was denied. That message would have been the same even if the agents had only the dog alert at the time of the request for consent.

In *United States* v. *Race*, F.2d 12 (1st Cir.1976), the First Circuit faced a similar dilemma. The intervention in that

case began with a dog alert to a crate in an American Airlines warehouse. After the alert, the dog handler used a knife to penetrate the crate. After insertion into the side of the crate, the knife smelled of marijuana. When the owner came to pick up the crate, he was stopped and questioned. At first he would not respond to requests for his consent to search the package. The agents afforded him the opportunity to discuss the situation with a prosecutor. After an hour of relaxed discussion, during which the defendant articulately asked questions regarding the situation and was repeatedly told that he did not have to consent to the search, the defendant signed a written search consent.

The defendant later argued that the knife stab was an illegal search which rendered his later consent invalid. The Circuit assumed without deciding that the knife insertion was an illegal search but held that the consent was not the "fruit" of that search.

> The prior alert by the specially trained dog to the two heavy crates from a border state provided sufficient cause to arrest the defendant and ample notice to request his consent to search. That consent, once obtained, provided a means of coming at the evidence that was, in our view, "sufficiently distinguishable to be purged of the primary taint."

Race, 529 F.2d at 15.

Three factors make it difficult to use *Race* to determine the outcome of our case. First, in *Race* it is not made clear in the court's decision whether the defendant was ever told about the knife search at all. If he was not, there was no "coercion" for the same reasons as articulated by the *Carson* court.

Second, even if the *Race* defendant was told about the knife search, that procedure provided investigators with very little information that they didn't already have with the dog sniff. The knife insertion gave the police no indication, for instance, of the amount of contraband. There was little gleaned from the knife search that we can imagine would have influenced

the defendant's decision to consent. In our case, on the other hand, Nieves emphasized to Mr. Jose Maldonado the fact that the actual packages of cocaine had been observed, and specifically referred to the large quantity of the apparent contraband.

Third, since the voluntariness of the search is determined by all the circumstances, the other circumstances surrounding the *Race* consent and that given by Mr. Jose Maldonado vary considerably. The defendant in *Race* was not formally under arrest. Mr. Jose Maldonado was handcuffed (or at least had been earlier in the day). The defendant in *Race* was repeatedly instructed of his right to refuse. Mr. Jose Maldonado was not. The defendant in *Race* engaged the prosecutor in an hour-long informed discussion of his rights prior to consent. Mr. Jose Maldonado consented with a single word and a shrug.

All factors considered, however, we find that the consent given by Mr. Jose Maldonado was voluntary and was not the result of "exploitation" of the prior illegality. Distilled to its essence, the message which Nieves gave Mr. Jose Maldonado was that the agents believed the bags contained drugs and that they could and would obtain a search warrant if consent was refused. It is the same message with or without the specifics about the X-ray. Although we cannot know if the agent's tone was more firm or his conviction more steady due to the heightened knowledge that the X-ray gave him, we do not think our determination should be based on subtle shadings of demeanor. We think that Mr. Jose Maldonado would have consented even if he was advised only of the dog sniff.

Abandonment Disclaimer

[10] Ms. Carmen Maldonado disclaimed ownership of the two suitcases bearing her alias. First, we must determine whether the disclaimer divests her of any Fourth Amendment

protected privacy interest. Second, we must determine whether the disclaimer was the product of the illegal X-ray search.

In *United States* v. *Miller*, 589 F.2d 1117 (1st Cir.1978), *cert. denied*, 440 U.S. 958, 99 S.Ct. 1499, 59 L.Ed.2d 771 (1979). DEA agents set four suitcases taken from defendant's car before defendant and asked for his consent to search them. The defendant denied both ownership and any knowledge of the owner of the bags. Three of the bags, already unlocked, were opened and revealed nothing. A fourth bag had a combination lock. The defendant agreed to open the lock, although he maintained that he was not the owner of the bag. The bag was searched and drugs were found. The First Circuit held that the combination of the disclaimer and the unlocking of the bag amounted to a consent-in-fact. The court wrote that "one who disclaims any interest in luggage thereby disclaims any concern about whether or not the contents of the luggage remain private." *Miller*, 589 F.2d at 1131.

The holding of *Miller* has been misread to be based on a lack of *standing*. LaFave, *Search and Seizure, 2nd Ed.*, § 11-3(f), n. 285 (holding of *Miller* characterized as "no standing where defendant disclaimed interest in luggage which police had just removed from his care and for which defendant had supplied the combination"). Since the *Miller* court found that the search was based on "consent-in-fact" it technically did not find a lack of standing, since no consent is needed where a person has no standing to challenge the search.

That said, however, we find the distinction between "no-standing" and "consent-in-fact" in disclaimer cases not to be a useful one. The Supreme Court in *Rakas* v. *Illinois*, 439 U.S. 128, 138, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), recognized that at times the standing inquiry must be abandoned and a "substantive Fourth Amendment" analysis employed instead. In *United States* v. *Hawkins*, 681 F.2d 1343, 1344 (11th. Cir.), *cert. denied*, 459 U.S. 994, 103 S.Ct. 354, 74 L.Ed.2d

391 (1982), the court in a "disclaimer" case wrote that "a focus on 'standing' is not now the proper approach to the ultimate question. After *Rakas* [cite *surpa*], the proper analysis proceeds to the substance of a defendant's Fourth Amendment claim . . . ." In *United States* v. *McBean*, 861 F.2d 1570 (11th Cir.1988), another disclaimer of luggage case, the Eleventh Circuit reasserted its belief that *Rakas* requires a substantive Fourth Amendment application rather than a technical standing inquiry.

Whatever the name for the test, (standing or substantive Fourth Amendment, the threshold question in determining whether a person has a "constitutionally protected reasonable expectation of privacy," *Katz* v. *United States*, 389 U.S. 347, 360, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967), is the same: "has the individual manifested a subjective expectation of privacy in the object of the challenged search?" *California* v. *Ciraolo*, 476 U.S. 207, 211, 106 S.Ct. 1809, 1811, 90 L.Ed.2d 210 (1986).[8]

In *United States* v. *Tolbert*, 692 F.2d 1041 (6th Cir. 1982), *cert. denied*, 464 U.S. 933, 104 S.Ct. 337, 78 L.Ed.2d 306 (1983), DEA agents stopped and questioned a woman in the Atlanta airport. The woman showed the agents a ticket to Chicago which contained a claim check. The agent noted the number of the check. The woman was allowed to proceed to Chicago. On arrival she failed to pick up any luggage and headed straight for a cab. Agents in Chicago stopped her and asked for her ticket. The claim stub had been removed. The woman was detained, and the luggage corresponding to the baggage claim number recorded by the agent in Atlanta was retrieved. The woman denied ownership, and the bag was searched without a warrant. The court held that "Tolbert can hardly assert that she 'exhibited an actual (subjective) expectation of privacy' respecting the luggage when she specifically

[8] The second part of the inquiry, which we need not reach, is whether the "society is willing to recognize that expectation as reasonable." *Ciraolo*, 476 U.S. at 211, 106 S.Ct. at 1811.

disclaimed ownership thereof." *Tolbert*, 692 F.2d at 1045, *accord*, *United States* v. *Knox*, 839 F.2d 285 (6th Cir. 1988).

In *United States* v. *McBean*, 861 F.2d 1570 (11th Cir. 1988), the court held that where the suspect disclaimed ownership of the suitcases found in the trunk of his car, and stated that he did not know who owned them, "not only did he fail to manifest a subjective expectation of privacy in the luggage and its contents, he affirmatively disavowed any such expectation." *McBean*, 861 F.2d at 1574, *accord*, *United States* v. *Rush*, 890 F.2d 45, 48 (7th Cir. 1989) (no manifestation of privacy interest when individual carrying suitcase in train station denied ownership upon inquiry by police); *United States* v. *Carrasquillo*, 877 F.2d 73 (D.C.Cir. 1989) (denial by train passenger that garment bag under his seat was his divested him of privacy interest at time of search). We hold that Ms. Carmen Maldonado failed to manifest any privacy interest in the luggage or the contents thereof, and in fact affirmatively disclaimed any such interest.

Effect of X-ray on Disclaimer

[11] An abandonment, or in this case disclaimer, can be deemed ineffective if it is the product of improper police conduct. In *United States* v. *Roman*, 849 F.2d 920 (5th Cir. 1988), a passenger arrived in Texas airport for a domestic flight. Customs officials observed him check in two suitcases. The agents had some suspicion regarding the bags. The agents approached the bags and detected a soapy odor of the type used to mask marijuana. They X-rayed the bags out of view of Roman and without his knowledge. The X-ray was inconclusive. They then approached Roman, who repeatedly denied ownership of the bags. The bags were searched without a warrant; the drugs were found. Roman sought to suppress on the theory that the X-ray was illegal and therefore his disclaimer of ownership was the fruit of an illegal search.

The court assumed without deciding that the X-ray search was illegal, but it refused to find a nexus between the search and the disclaimer. The court noted that the X-ray was inconclusive, and that there was no evidence that Roman was ever told that the X-ray had been performed. The court pointed out that Roman was not being detained at the time of the disclaimer.

[12] In our case, Agent Nieves described the X-ray search and its explicit results to Ms. Carmen Maldonado. He told her about the packages that had been viewed, and about the quantity of contraband that had been observed. During her own testimony she stated that all the agents throughout the course of the events prior to the disclaimer kept telling her of the large quantity of drugs in the suitcases, information which they presumably knew on account of the X-ray.

Still, we think the analysis applied to Jose applies equally well to Carmen. While the X-ray provided the police with more specific information than they had after the dog sniff, it did not alter the basic message given to Carmen Maldonado: the luggage contained contraband substance, and the agents were going to open the luggage either on consent or with a warrant. We see no reason to believe that the detail added by the X-ray "coerced" the disclaimer. Carmen Maldonado knew that the agents believed there were drugs in the bags checked under her alias, and she sought to assure the agents that the bags were not hers. No more is needed to justify this search.

Conclusion

The motion of both defendants to suppress evidence is denied in all respects. But law enforcement officials should take no solace in today's decision. While we find these searches to be justified, we also find that the individuals involved in the operation leading to this prosecution are inadequately trained in legally acceptable investigative techniques. Customs

officials familiar with procedures appropriate only in the border context are being called upon to perform general drug screening of domestic travel with little or no understanding as to the legal ramifications of their actions. They do not know what type of searches can be conducted, when, on whom, or on what. It is only a matter of time before a major bust operation will be thrown out on a suppression issue because the officials' untrained approach to search and seizure leaves another court with no choice but to throw out the evidence.

Testimony from the several law enforcement personnel that appeared before us, both Customs officials and drug enforcement agents, established that none of them had ever obtained a search warrant of any kind. It was not clear to us whether the officials are even well versed in the current procedures to obtain such a warrant.

We do not mean to suggest that law enforcement officials facing the wave of drug trafficking have an easy task. But professionalism in law enforcement requires that officers and agents be trained in evidence acquisition techniques which can be upheld in court. In the case before us, the simple matter of obtaining a search warrant based on the dog's sniff would have eliminated all the doubts and confusions through which we have had to sift to determine the validity of these searches. It would have avoided the possibility of suppression, which was very real in this case. It would have relieved busy drug enforcement personnel like Agent Nieves from the time consuming and uncomfortable experience of having to explain inconsistent and contradictory testimony in an effort to have a warrantless search deemed legal after the fact.

In short, drug enforcement activities at Puerto Rico's international airport are on the increase. From what we have seen, the officials charged with that job have not been properly trained. They are not prepared to get warrants, and they do not understand the exceptions to the warrant rule which would justify warrantless searches. We hope that situation will be corrected in short order, and that this court will not

again be forced to justify after the fact searches which could and should have been conducted in a manner which would have raised no questions of legality.

IT IS SO ORDERED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

CRIMINAL No. 91-149 (RLA)

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

MARIA DE LOS SANTOS FERRER,
DEFENDANT.

ORDER SUPPRESSING ILLEGALLY OBTAINED EVIDENCE

I. *Introduction*

The Court has before it an appeal from a Magistrate's Report and Recommendation which denied defendant Marie de Los Santos Ferrer's motion to suppress certain evidence seized on March 26, 1991.[1] In view of the imminent trial date, the Court issued its suppression ruling on July 22, 1992, docket No. 112.[2] This Order provides the grounds in support thereof.

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[1] *See* Appeal from the Magistrate's Report and Recommendation, docket No. 97, filed on January 31, 1992. *See also* United States Response to Appeal, docket No. 99, filed on February 24, 1992; Magistrate's Report and Recommendation, docket No. 90, filed on December 18, 1991; Motion to Suppress Evidence, docket No. 79, filed on October 18, 1991 and the Government's Response, docket No. 81, filed on November 12, 1991.

[2] After the ruling, the Court received from the prosecutor a Request for Reconsideration . . . , docket No. 116, filed on July 29, 1992 and a Supplement thereto filed on July 31, 1992, wherein he presumptuously lectures the Court on the matters to be considered in its de novo determination before even receiving the Court's Opinion and Order on the subject.

II. *Factual Background*

On March 26, 1991, the United States Customs Service (USCS) was conducting a narcotics detection drug training session in the American Airlines baggage area of the Luis Munoz Marin International Airport in Carolina, Puerto Rico when the specially trained dog, OBI-C503, responded to narcotics aroma on three pieces of luggage destined to Miami, Florida. The dog-sniffing apparently took place on one of the several ramps in the baggage area that routinely intermingle domestic and internationally destined luggage prior to their being taken to their respective flights.[3] Dog handler, Juan Antonio Gracia, and Inspector Luis Gonzalez, who was assisting him in the dog training operation, proceeded to take the bags to an Agriculture Department X-ray machine, which allegedly revealed several "blocked shaped" packages within all three suitcases. The agents alerted Customs Inspector Oyola, who in turn informed USCS Special Agent Marilyn Garcia that the apparent owner of the suitcases was on seat 22B of American flight No. 1077, which was bound for Miami and about to depart. Special Agent Garcia proceeded to Gate 6, accompanied by Special Agent Ismael Rodriguez and Customs Inspector Oyola. With the assistance of a flight attendant, they located Row 22B where the alleged owner of the bags, a Ms. Maria Torres, was believed to be seated according to the luggage tags and airline information. They found a male seated in 22B and a female seated beside him. Upon identifying themselves, the agents learned the identity of codefendant Anibal Torres and that the woman seated next to him was his wife, codefendant Maria de los Santos Ferrer, also known as Maria Torres. Ms. Torres produced the two airplane tickets, along with the baggage claim tickets corresponding to the three suitcases in question. Thereupon, both

[3] The Court carried out a field inspection of this area, along with the parties, on March 25, 1992. *See* docket Nos. 103 and 104.

defendants were deplaned and taken to separate search rooms in the Customs enclosure area for further investigation. At the enclosure area, both defendants were detained until Drug Enforcement Administration (DEA) agent Enrique Nieves arrived. Special Agent Garcia read defendant her rights; defendant was also patted down and frisked and provided an acknowledgement and waiver of rights form, which was not signed until later, when DEA agent Nieves arrived to take charge of the situation. Supervisor Customs Special Agent Benjamin Garcia then questioned defendant about her relationship to Mr. Torres and where she lived and worked; he also inquired about the suitcases, because the baggage tags had "her names [sic] on them". Defendant replied that the suitcases were not hers. Despite further interrogation from Mr. Garcia, defendant chose to remain silent. When DEA agent Enrique Nieves arrived, he informed her that a Customs dog had alerted to three suitcases that were under her name, that an X-ray had been taken of the suitcases, showing packages which in his experience he believed to be drugs and that he needed her consent to open them. Defendant was told by Nieves that if she declined to give her consent, that he (Nieves) "had enough reason" to get a search warrant to open them. At this point, there is a contradiction as to defendant's alleged consent. Agent Marilyn Garcia testified that upon being questioned by DEA agent Nieves, defendant replied that she could not authorize the opening of the suitcases because they were not hers. Agent Nieves, on the other hand, stated that he insisted on obtaining her consent because he believed the suitcases belonged to her and that, at no time, did he consider the suitcases abandoned. Thus, on direct examination, he testified as follows:

> I proceeded to tell her that we needed her permission to get those bags opened and that if it did not occur I would need to get a search warrant. I had enough reason — that I could get a search warrant if she did not consent to her opening them. . . .

> Then — so I reiterated that, making sure that she understood clearly what was happening, because she was a little either upset or withdrawn or uncooperative in at least acknowledging that she understood what I was saying. . . .
>
> . . . .
>
> At that point, I asked for her permission to open the suitcases. She apparently — she hesitated and then nodded with her head, go ahead open them. Yes, in an affirmative manner and I proceeded to open the suitcases in front of her. . . .

Upon further questioning on this issue, DEA agent Nieves stated:

> Like I said, she hesitated and then nodded yes; go ahead open them. That was an affirmative gesture and I opened the bags in front of her.

Transcript of suppression hearing, docket No. 96 at 75-76.

After Nieves field tested the contents of the suitcases, he placed defendant under arrest. In all, defendant was detained for more than an hour before she was formally arrested.

The U.S. Magistrate Judge found that defendant had voluntarily waived her rights and denied the suppression. Defendant objected to the magistrate's findings regarding the canine sniff, the X-ray search, the voluntariness of the alleged waiver of rights and the purported consent to open the suitcases, which, she argues, was given involuntarily and under duress and coercion due to the "stationhouse" atmosphere and custodial interrogation to which she was subjected at the time. In essence, her objections embody an overall objection to the Magistrate's entire report. In response, the Government does not address the voluntariness finding by the Magistrate but argues instead that defendant had no standing to seek suppression of the suitcases or their contents because she lost her

expectation of privacy when she disclaimed ownership of the baggage.

The factual scenario described above bears such a similarity to that presented to Judge Jose Antonio Fuste in *United States* v. *Maldonado-Espinosa*, 767 F.Supp. 1176 (D.P.R. 1991) as to catch this Court's attention to an apparent pattern of conduct exhibited by the Government agents at the airport in their avid pursuit of a "consent" to open suitcases believed to contain narcotics. We set forth below the factual background of the *Maldonado* case and portions thereof which we consider illustrative of matters which the Court considered puissant and influential to its decision in the case at hand.

On February 28, 1991, United States Customs agents at the Luis Munoz Marin Airport, using a trained narcotics detection dog, identified four suitcases as probably containing narcotics. Based on this alert, they identified two passengers on a flight destined for Miami, Jose Maldonado Espinosa and his sister Carmen, as the suitcases' likely owners. They detained, frisked, handcuffed and interrogated the Maldonados. DEA agents, acting on an alleged consent, subsequently forced open the suitcases and found cocaine. Among the agents who intervened with the Maldonados were USCS agent Marilyn Garcia, supervisor Benjamin Garcia and DEA agent Enrique Nieves. The government agents' method for obtaining consent from the Maldonados is best described in passages quoted from the District Court's opinion:

> . . . Nieves testified that he asked Mr. Jose Maldonado if these were his suitcases, and that Mr. Jose Maldonado acknowledged, that he nodded, and that he said yes. Nieves asked if be could open the suitcases, and that it would be done in Mr. Jose Maldonado's presence. Nieves testified that Mr. Jose Maldonado hesitated. Nieves asked again and told Mr. Maldonado that they were going to open the suitcases either with consent or a warrant. Nieves testified that at that point Mr. Jose Maldonado said yes and gestured affirmatively.

> . . . .
> Nieves himself testified he told Ms. Carmen Maldonado about the results of the dog sniff and the X-rays. On direct examination, he testified that on his request for oral consent, Ms. Carmen Maldonado said that the bags were nor hers, Nieves could open them. He testified that he understood by her gestures what she meant. Special Agent Marilyn Garcia, who witnessed the discussion, confirmed that Ms. Carmen Maldonado said that the suitcases were not hers, but contradicted Nieves on the point about whether Ms. Carmen Maldonado went on to actually consent. Agent Garcia testified that Ms. Carmen Maldonado never actually verbally consented to the search, but that Agent Garcia felt that in her opinion, Ms. Carmen Maldonado consented by gesture.
>
> . . . .
>
> On the recall for clarification by the Court, Nieves testified that upon reviewing his Grand Jury testimony, he now believed that what Ms. Carmen Maldonado had actually given was a combination of consent and abandonment. He admitted that it was difficult to remember what occurred, but that the message he understood from her was "open them", and that he got that impression from both words and gestures . . .

Maldonado, 767 F.Supp. at 1179-80 (emphasis added).

III. *Discussion*

A. *Standard of Review*

The Motion to Suppress was referred to the U.S. Magistrate pursuant to 28 U.S.C. §636(b), which section provides, *inter alia*, that the Court shall make a de novo determination of those portions of the report to which objections are filed, and accept, reject, or modify, in whole or in part, the findings

and recommendations made by the Magistrate. Because the defendant's objections, as mentioned, advanced a general objection to the Magistrate's findings, the Court conducted a de novo review of the record, including an exhaustive reading of the transcripts, the motions filed by the parties and the applicable case law. Based on this comprehensive review, the Court finds as follows:

B. *Searches*

(1) *Dog Sniff*

The exceptions to the warrant requirement of the Fourth Amendment are (1) when the search is incidental to a valid arrest; (2) when the search is effectuated pursuant to probable cause and there are exigent circumstances which preclude obtaining a warrant; (3) when there is consent to search. *Terry* v. *Ohio*, 392 U.S. 1 (1968).

The Magistrate properly concluded that the investigative procedure of subjecting luggage to a sniff test does not constitute a search within the meaning of the Fourth Amendment. *See United States* v. *Place*, 462 U.S. 696, 707 (1983) (dog sniff not a "search"); *see also*, *United States* v. *Race*, 529 F.2d 12, 14 (1st Cir. 1976) (particularized suspicion not required for random dog sniffing of international luggage). Accordingly, we do not disturb his findings on this issue and hereby adopt without modification this section of his report.

(2) *X-Ray Search*

The Magistrate failed to discuss and apparently did not consider the X-ray of the baggage a search, mentioning only in passing that "[u]pon subjecting luggage to X-rays after a canine affirmative reaction to contraband, the agents are in possession of probable cause to detain. . . ." Because we find this matter pivotal to our decision today, we must reject the Magistrate's tenuous treatment of this issue.

There is no question that the X-ray of a suitcase constitutes a search within the meaning of the Fourth Amendment. *United States* v. *Davis*, 482 F.2d 893 (9th Cir. 1973); *United States* v. *Sullivan*, 544 F.Supp. 701 (D.C. Me. 1982), *aff'd.*, 711 F.2d 1 (1st Cir. 1983); *United States* v. *Epperson*, 454 F.2d 769 (4th Cir.) *cert. denied*, 406 U.S. 947 (1972). On the other hand, few will argue against the reasonableness of the use of the X-ray machines at airports to detect dangerous artifices. This type of activity has long been licensed under the rationale of an administrative search and for much needed security reasons. *See United States* v. *$124,570 U.S. Currency*, 873 F.2d 1240, 1244 (9th Cir. 1989) (warrantless search of baggage at airport limited to administrative/regulatory scheme of excluding weapons and explosives from plane); *see also*, *United States* v. *Davis*, 482 F.2d 893, 908 (9th Cir. 1973) (essential purpose of the scheme is to deter persons carrying weapons or explosives from boarding airplane). In addition, the Department of Agriculture's X-ray of luggage at the airport is a lawful administrative/regulatory search, concerned only with agricultural products and meeting reasonable administrative search standards. *See generally*, *Camara* v. *Municipal Court of San Francisco*, 387 U.S. 523 (1967). As such, airport X-ray searches enjoy their administrative exception to the warrant rule only so far as they are conducted to further compel the administrative purposes of keeping weapons and other items from being introduced into the aircraft. *United States* v. *Maldonado-Espinosa*, 767 F.Supp. 1176, 1187 (D.P.R. 1991) (citing *U.S. Currency*, 873 F.2d at 1244).

Neither of these administrative-type X-ray searches was effectuated upon defendant' suitcases. The Custom officials in this case indicated that they took the luggage to the Agriculture Department's X-ray machine after their trained canine had given them a positive response, without seeking a warrant and even before defendant was detained.

Because this search cannot qualify as a valid search pursuant to a regulatory scheme meeting administrative standards, and because it was not performed as a routine inspection under normal Agriculture operations[4] the Customs agents acted unconstitutionally when they took X-rays of the suitcases, rather than securing a search warrant to open defendant's luggage. *Cf. United States* v. *Maldonado-Espinosa*, No. 91-1243, slip op. at 7 (1st Cir. June 30, 1992) (noting that the X-ray in that case was "rather unusual" but declining to decide the issue of whether an X-ray search of luggage after the government already has probable cause is unconstitutional).

Armed with the knowledge that the suitcases contained "packages" of narcotics, the agents utilized this unlawful intrusion for yet another objectionable purpose, i.e., to pressure defendant into giving her consent to open the luggage.

(3) *Opening of Luggage*

The opening of Maria de los Santos' luggage was also an illegal search since it was carried out without a warrant and was not based on one of the well established exceptions to the warrant requirement.

The Magistrate concluded that defendant voluntarily gave up her rights, and that there had been no showing of duress and/or coercion or an unreasonable period of detainment at the time the written waiver was obtained.[5] Based on this, he recommended that the motion to suppress he denied.

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[4] It appears that these searches, which operate as a convenient alternative to warrant requirements, were taking place pursuant to an unwritten agreement between USCS and the U.S. Department of Agriculture, which we understand has since been discontinued. *See United States* v. *Mirtelina Jimenez*, Cr. No. 91-192 (GG) Magistrate's Report and Recommendation at 3-4, docket No. 21, filed on November 5, 1991.

[5] The consent form shows that defendant was detained at 9:18 p.m. and signed the waiver of rights at 9:49 p.m. *See* Exhibit 1 to the suppression hearing. Defendant alleges that the form she thought she was signing was an *acknowledgement*, not a *waiver* of rights form. *See United States* v.

Although normally we would be reluctant to set aside a Magistrate's findings on credibility, we find from the totality of the circumstances that defendant was subjected to, i.e., a custodial, "stationhouse" atmosphere, detained for over an hour, not free to leave at will and subjected to a frisk and interrogation by several government agents, that defendant's alleged disclaimer or consent was neither valid nor voluntary.

The DEA and Customs agents who questioned defendant in the Customs enclosure area insisted on pressuring her into consenting, confronting her with the results of the illegal X-ray search and reiterating the fact that a warrant would nevertheless be obtained to open the valises. Faced with the futility of her refusal, defendant denied ownership, telling the agents to do whatever they wanted with the bags. This situation created a sense of resignation in her mind that rendered her alleged disclaimer involuntary and a fruit of the prior illegality. *See Wong Sun* v. *United States,* 371 U.S. 471 (1963) ("fruit of the poisonous tree" doctrine).

Moreover, when the agents informed defendant that if consent was not forthcoming they would in any event secure a search warrant, there was a clear intimation that defendant would be retained in custody until the warrant was obtained. Thus, even if defendant "nodded" her approval, her acts cannot be deemed voluntary. *United States* v. *Ocheltree,* 622 F.2d 992, 994 (9th Cir. 1980) (consent not voluntary when given under the threat of a warrant).

It is significant that this exact pattern of conduct, i.e., dog sniff, followed by an illegal X-ray search and then an alleged disclaimer or "consent by nodding" is recurrent in other cases in this district, amply demonstrating that "the Customs [and DEA] agents did not act in good faith. There are no qualifications to the illegality of the searches they conducted. They are simple trying to use the defendant's disclaimer as a back-door

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Suarez, 786 F.Supp. 1073, 1080 at note 8 (D.P.R. 1991) for a discussion on the agents' apparently similar treatment of the written form presented to defendant for signature.

tactic to retroactively validate their actions." *United States* v. *Suarez*, 786 F.Supp. 1073 (D.P.R. 1991); *see also*, *United States* v. *Maldonado Espinosa*, 767 F.Supp. 1176 (D.P.R.); *United States* v. *Mirtelina Jimenez*, Cr. No. 91-192 (GG).

Based on the foregoing, we find defendant's purported consent or disclaimer to be invalid. There being no exception to the warrant requirement, the government agents should have sought a warrant from an impartial magistrate before conducting a search of defendant's luggage.

III. *Conclusion*

Based on an exhaustive review of the record before us, we find that defendant's alleged consent was far from voluntary. Accordingly, the Motion to Suppress filed by Maria de los Santos Ferrer is hereby GRANTED.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 3rd day of August, 1992.

s/ RAYMOND L. ACOSTA

RAYMOND L. ACOSTA
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CRIM. NO. 91-0192 GG

UNITED STATES OF AMERICA

v.

MIRTELINA JIMENEZ

ORDER

On July 23, 1991 defendant filed a motion to suppress evidence obtained as a result of an illegal search and seizure. A hearing was held before the magistrate, and on November 5, 1991 the magistrate filed a report and recommendation recommending that the motion be granted. No objections to said report have been filed by any party within the ten-day period prescribed under the Local Rules of the Court, Rule 510.2. Consequently, a *de novo* determination is not required. 28 U.S.C. § 636(b)(1)(C) provides that "[a] judge of the district court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." However, no review is required of any issue that is not the subject of objection. *Thomas* v. *Arn*, 474 U.S. 140 (1985); *United States* v. *Valencia-Copete*, 792 F.2d 4 (1st Cir. 1986).

Wherefore, in view of the foregoing, the Magistrate's Report and Recommendation filed on November 5, 1991 is hereby approved and fully adopted as our own, 28 U.S.C. § 636(b)(1)(C), and consequently, defendant's motion to suppress is hereby GRANTED.

SO ORDERED.
San Juan, Puerto Rico, this 8th day of January, 1992.

s/ GILBERTO GIERBOLINI

GILBERTO GIERBOLINI
Chief U.S. District Judge

s/co to: R. ANGLADA
AUSA
PTS, P.O. 215M
1-9-92
ULY

APPENDIX E

UNITED STATES DISTRTICT COURT FOR THE
DISTRICT OF PUERTO RICO

Cr. No. 91-192 (GG)

UNITED STATES OF AMERICA

v.

MIRTELINA JIMENEZ

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION TO THE HON. GILBERTO GIERBOLINI

On May 22, 1991, in the District of Puerto Rico and within the jurisdiction of this Court, the defendant Mirtelina Jimenez was charged with violations to Title 21, U.S.C., Section 841 (a)(1), for possession with intent to distribute of approximately thirteen (13) kilograms of marihuana, which were seized from her suitcase at the airport. Upon motion by the defendant a suppression hearing was held on October 23, 1991.

U.S. Customs Agent Juan Antonio Gracia-Garcia was the first witness to testify. He stated that he was conducting a training session with his sniff dog at the American Airlines terminal (sniff dogs require regular training to order to keep their certification). The terminal included luggage from all flights, domestic and international, which were not yet sorted. The defendant's suitcase, a lavender Samsonite hard-shell, carrying her name, provoked the dog's reaction. The suitcase was clearly identified as transiting from San Juan, P.R., to New York City (see Exhibits 1 and 2). Customs Inspector Manuel Rosario was the next witness. He testified that he and officer Garcia contacted officer Roberto Rivera of the U.S. Department of Agriculture (U.S.D.A.) so he would x-ray the suit-

case for them. It was upon their request that U.S.D.A. officer Roberto Rivera did so. Since various rectangular packages were revealed, Rivera opened the suitcase and actually found 27 packages of marihuana. Customs Inspector Herdmann identified the defendant at the American Airlines Gate No. 9, and brought her to the Customs' Service Area. The defendant was read her rights. Agent Manuel Rosario testified that the defendant denied ownership of the suitcase. Drug Enforcement Administration (DEA) agent Lissette Irizarry, the third witness, testified that when she arrived at the scene, she received all the evidence and the defendant from Inspector Gracia. She testified that in her experience it was the first time everything had been as thoroughly accomplished at the time she arrived at the scene. Irizarry advised the defendant of her rights once again and asked for her consent to search. The defendant told her that she agreed because the suitcase had already been opened. The last witness was the defendant herself, who testified that she did not deny owning her suitcase. That indeed she knew upon being called by the officer that her suitcase containing marihuana had been caught, and that when asked by the D.E.A. agent to consent to have the suitcase open, she said yes because it had already been opened.

The use of drug-sniffing dogs in the search for illicit drugs is not uncommon and has been the subject of cases in this and other circuits. Considered a non-intrusive activity, the canine's action do not qualify as a search. See *United States* v. *Sokolow*, 490 U.S. 1, 5 (1989). Again, while the positive sniff may serve as probable cause, the dog action is not reputed a search. See *United States* v. *LaFrance*, 879 F.2d 1 (1st Cir. 1989).

The x-raying of the luggage on the other hand is clearly an obtrusive search and is therefore allowed only as an exception to the well-recognized warrant requirement of the Fourth Amendment. While the use of x-ray machines at airports to detect dangerous artifices is legal, it cannot be used as a subterfuge in drug cases. Of course, if contraband is innocently

discovered, it may be used in court against its owner. See *Abel* v. *United States*, 362 U.S. 217 (1960). However, if the search did not qualify as a border search because the luggage was traveling in domestic traffic, as such it is excluded from the realm of authority of U.S. Customs. See *Torres* v. *Puerto Rico*, 442 U.S. 465 (1979). It cannot qualify as a search pursuant to a regulatory scheme meeting reasonable administrative standards because it was not performed as a routine inspection under normal Agriculture operations. Indeed, it was the result of an unwritten agreement between Customs and Agriculture which operated as a convenient alternative to the warrant requirement, and which has at present been discontinued. Cf. *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987); *Camara* v. *Municipal Court*, 387 U.S. 523, 538 (1967). Customs simply cannot open domestic luggage without a search warrant unless an exception to the warrant requirement is present. The exceptions to the warrant requirement are when: (1) the search is incidental to a valid arrest, (2) the search is effectuated with probable cause, under exigent circumstances, or (3) there is consent to search. *Terry* v. *Ohio*, 392 U.S. 1 (1968). None of those exceptions are present in this case because when the defendant consented to the DEA agent, as agent Irizarry herself stated, she did so because the suitcase was already opened by Customs. The improper search in question here is that of the Customs Service for which there was no consent. Cf. *New Jersey* v. *T.L.O.*, 469 U.S. 325, 351 (1985). The Government avers that the defendant lacks standing to bring forth this motion because she denied ownership of the suitcase. Agent Rosario testified to that effect. The defendant testified, and this was corroborated by officer Irizarry, that she accepted ownership because it had already been opened. The evidence heard in Court inclines the balance in favor of the defendant's uninhibited testimony, and in favor of a determination of improper Government conduct. Circumventing the warrant requirement by using Agriculture x-rays is illegal because the x-raying is conducted at the direction of Customs

as a law enforcement function and not as an administrative one. There being no exception to the warrant requirement, the Customs agents should have sought a warrant from an impartial magistrate. Indeed, the agents involved testified that this practice has since been modified.

As such, the evidence obtained should be suppressed, and therefore it is recommended that the Motion to Suppress be granted.

Any objections to this Report and Recommendation must be filed with the Clerk of this Court within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order. See *Thomas* v. *Arn*, 474 U.S. 140 (1985); *Borden* v. *HHS*, 836 F.2d 4, 6 (1st Cir. 1987).

IT IS SO RECOMMENDED.

San Juan, Puerto Rico, on this 31st day of October, 1991.

s/ ROBERTO SCHMIDT-MONGE

ROBERTO SCHMIDT-MONGE
U.S. Magistrate Judge

s/co to: AUSA
R. ANGLADA
USM, PTS P.O.
11-5-91
UG